89- 1313

No. _____

IN THE

Supreme Court of the United States

October Term, 1989

IRWIN D. BROSS,

Petitioner,

vs.

THOMAS K. TURNAGE, As Administrator of Veterans Affairs for the United States Veterans Administration; THE VETERANS ADVISORY COMMITTEE ON ENVIRONMENTAL HAZARDS; THE SCIENTIFIC COUNCIL OF THE VETERANS ADVISORY COMMITTEE ON ENVIRONMENTAL HAZARDS; and THE UNITED STATES VETERANS ADMINISTRATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

JOHN G. BRENON, ESQ.
Counsel of Record
5330 Main Street
Williamsville, New York 14221
Telephone: (716) 633-7860

LEWIS STEELE, ESQ.
COUNSELOR AT LAW, P.C.
P.O. Box 1235
Albany, New York 12201
Telephone: (518) 854-9582

Attorneys for Petitioner

Batavia Times Publishing Co.
Batavia, N.Y. (716) 344-2000

Questions Presented

1. Whether an individual who presents a scientific study to the Scientific Counsel of the Veterans Advisory Committee on Environmental Hazards ("Scientific Council") and/or the Veterans Advisory Committee on Environmental Hazards ("Committee") for review pursuant to 38 U.S.C. Section 354, note (Supp. V 1987) at Section 6 has standing to challenge adverse determinations relative to such studies made by said entities.

2. Whether an individual who presents a scientific study to the Scientific Council and/or to the Committee for review pursuant to 38 U.S.C. Section 354, note (Supp. V 1987) at Section 6 has standing to challenge adverse determinations made by those entities relative to such studies as a result of that review on the basis that the Scientific Council and/or the committee failed to follow the review procedures mandated by the statute or otherwise conducted an inadequate and/or unfair review.

3. Whether an author of a scientific study within the purview of 38 U.S.C. Section 354, note (Supp. V 1987) has standing to raise challenges to whether, or the manner in which, that statute is followed in the review, consideration, and/or evaluation by the Committee, the Scientific Council, the Veterans Administration, and/or its Administrator of that study.

4. Whether the violation of the review procedures set forth in 38 U.S.C. Section 354, note (Supp. V 1987) at Section 6, or the otherwise failure of the Scientific Council and/or the Committee to adequately, completely and/or fairly review scientific studies submitted to them in accordance with that statute deprive the authors thereof of a constitutionally protected property interest.

List of Parties

All parties to the proceeding before the United States Court of Appeals for the Second Circuit appear in the present caption.

TABLE OF CONTENTS.

Page

Page

Appendix:

Page

TABLE OF AUTHORITIES.

Cases:

Page

Page

Statutes:

Rules and Regulations:

Page

Constitution:

Other Authorities:

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays a Writ of Certiorari issue to the Court of Appeals for the Second Circuit to review the November 17, 1989 Judgment and Order in this proceeding.[1]

[1] Counsel herein acknowledge and recognize the assistance and contribution of Mr. Lee A. Albert, Esq., Professor of Law and Associate Dean, Faculty of Law and Jurisprudence, State University of New York, University at Buffalo.

Opinions Below

The Judgment and Opinion of the United States Court of Appeals for the Second Circuit from which review is sought is reported at 889 F.2d 1256 (2nd Cir. 1989), and is attached at pages 14a-18a in the Appendix to this Petition.

The Judgment and Memorandum Opinion of the United States District Court for the Western District of New York from which Petitioner appealed is not reported but is attached at pages 1a-13a in the Appendix to this Petition.

Jurisdiction

The United States Court of Appeals for the Second Circuit entered the Judgment from which review is now sought on November 17, 1989. Jurisdiction is now conferred upon this Court by 28 U.S.C. Section 1254(1).

Statutes and Rules Involved

This matter involves the Court's review and interpretation of the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, 38 U.S.C. Section 354, note (Supp. V 1987); the Administrative Procedure Act at Sections 701, 702, 704, and 706, appearing as 5 U.S.C. Section 701, 702, 704, and 706; 28 U.S.C. 1361; 38 U.S.C. 211, 223; 38 C.F.R. 1.12, 1.17, 3.311b; the Fifth Amendment to the United States Constitution; and Rules 12(b))6) and 56 of the Federal Rules of Civil Procedure.

The aforesaid statutes, rules, regulations, and constitutional provisions are set forth at pages 19a-56a in the Appendix to this Petition.

Statement of the Case

This case concerns the legality and constitutionality of particular actions and inactions of the Administrator of Veterans Affairs (the Administrator), the Veterans Advisory Committee on Environmental Hazards (the Committee), the Scientific Council of the Veterans Advisory Committee on Environmental Hazards (the Scientific Council), and the U.S. Veterans Administration (the VA). In particular, this case is based on the failure of the defendants to properly review and analyze these scientific studies and to make findings and evaluations with respect thereto as required by the Veterans Dioxin and Radiation Exposure Compensation Standards Act (38 U.S.C. Section 354) (hereafter referenced as the "Radiation Exposure Act" or the "Act") and the regulations promulgated pursuant thereto at 38 CFR 1.17, 3.311b(f), etc. and the Due Process Clause of the United States Constitution.

The Provisions of the Radiation Exposure Act

The Veterans Dioxin and Radiation Exposure Compensation Standards Act (the Act) was enacted in 1984 and it appears as a note under Section 354 of Title 38 of the United States Code. It is set forth in its entirety within the Appendix.

The purpose of the Act is, *inter alia*, to insure that appropriate Veterans Administration disability compensation is provided to veterans who were exposed to ionizing radiation as a result of their military service and in connection with atmospheric nuclear tests and for disabilities that are connected, based on sound scientific and medical evidence, with such exposure during such service. See 38 U.S.C. 354, n. 1, Section 3.

In order for the Veterans Administration to arrive at appropriate compensation determinations and to promote consistency in Veterans claims' processing and decisions, the Act requires that the Veterans Administration promulgate regulations to "(1) establish guidelines and (where appropriate) standards and criteria for the resolution of claims for (service connected death or disability) . . . based on . . . exposure during service (,) . . . in connection with . . . participation in atmospheric nuclear tests, to ionizing radiation from the detonation of a nuclear device." 38 U.S.C. 354, Note 1, Section 5(a)(1)(B).

The Act specifies that these guidelines are to include "guidelines governing the evaluation of the findings of scientific studies relating to the possible increased risk of adverse health effects of exposure to . . . ionizing radiation." 38 U.S.C. 354, n. 1, Section 5(b)(1)(A).

The Act requires that the evaluations of such scientific studies be made by the Administrator of Veterans Affairs of the Veterans Administration after receiving the advice of the appropriate (radiation) panel of the Scientific Council of the Veterans' Advisory Committee on Scientific Hazards. See 38 U.S.C. 354, n. 1, Section 5(b)(1)(B).

The Administrator of Veterans Affairs of the Veterans Administration is to evaluate these studies on the basis of:

> (A) The statistical significance of the results;
>
> (B) The capability of the results to be replicated; and
>
> (C) The ability of the material to withstand peer review.

See 38 U.S.C. 354, n. 1, Section 5(b)(1)(A). When completed, the evaluations are to be published in the Federal Register. 38 U.S.C. 354, n.1, Section 5(b)(1)(B); 38 C.F.R. 1.17.

Importantly, the Act also requires that the Veterans Administration promulgate regulations with respect to the use of such evaluations in the adjudication of individual claims for compensation based on injuries ascribed to service connected exposure to ionizing radiation resulting from participation in atmospheric nuclear weapons tests. See 38 U.S.C. 354, n. 1, Section 5(b)(1)(C). The promulgated regulations provide that the determination of service connection in the adjudication of claims for injury from exposure to ionizing radiation *must give due consideration to the evaluations published* pursuant to 38 C.F.R. 1.17 (emphasis supplied). See 38 C.F.R. 3.311b(f).

Section 6 of the Act establishes the Veterans' Advisory Committee on Environmental Hazards of the Veterans Administration ("Committee"). See 38 USC 354, n. 1, Section 6(a). According to the Act, and with certain restrictions, the Committee is to be appointed by the Administrator of Veterans Affairs and is to be composed of (a) three individuals who are recognized medical or scientific authorities in fields pertinent to understanding the health effects of exposure to dioxin, (b) three individuals who are recognized medical or scientific authorities in fields pertinent to understanding the health effects of exposure to ionizing radiation, (c) five individuals who are recognized medical or scientific authorities in fields such as epidemiology and other scientific disciplines, pertinent to determining and assessing the health effects of exposure to dioxin or ionizing radiation in exposed populations, and (d) four individuals from the general public, including at least one disabled veteran, having a demonstrated interest in, and experience relating to, veterans' concerns regarding exposure to dioxin or ionizing radiation. See 38 USC 354, n.1, Section 6(a)(1), (2).

Section 6 of the Act also establishes a Scientific Council of this Committee ("Scientific Council" or "Council") which is to be composed of all members of the

Committee, *excepting* the four individuals from the general public. See 38 U.S.C. 354, n.1, Section 6(d)(1).

The Scientific Council is divided into two eight member panels, one with responsibility for evaluating scientific studies relating to possible adverse health effects of dioxin, (the "dioxin panel") and the other with responsibility for evaluating such effects of exposure to ionizing radiation (the "radiation panel"). See 38 U.S.C. 354, n.1, Section 6(d)(2).

The Act provides that "the (Scientific) Council *shall* make findings and evaluations regarding pertinent scientific studies and *shall* submit to the Committee and the Administrator directly periodic reports on such findings and evaluations." 38 U.S.C. 354, n.1, Section 6(d)(1) (emphasis supplied).

The Procedure and Results Below

Dr. Bross filed his complaint on September 4, 1987 pursuant to the Administrative Procedure Act (hereafter referenced to as the APA), the Mandamus provisions of the United States Code (28 U.S.C. 1361), and the Due Process provisions of the U.S. Constitution challenging the failure of the government to comply with the provisions of the Act and the Due Process Clause of the Constitution.

The various claims raised by Dr. Bross are (that):

1. The refusal of the Administrator of the Veterans Administration to refer to the Radiation Panel of the Scientific Council of the Veterans Advisory Committee on Environmental Hazards for review his scientific studies relating to the adverse health effects of exposure to ionizing radiation;

2. The refusal of the Administrator of the Veterans Administration to publish in the Federal Register evaluations of his scientific studies relating

to the adverse health effects of exposure to ionizing radiation[2];

3. The refusal of the Veterans Administration, the Veterans Advisory Committee for Environmental Hazards and the radiation panel of the Council to properly consider, review, evaluate, and/or properly process his scientific studies is actionable under the APA, and/or has violated his right to due process, and

4. The determination by the Veterans Advisory Committee on Environmental Hazards that his scientific studies provides no basis for recommending changes in the Veterans Administration guidelines for compensation is erroneous as a matter of law, arbitrary and capricious, and not supported by substantial evidence and thus is actionable under the APA.

Dr. Bross requested that the District Court provide him with the following relief:

(1) A declaratory judgment that the Veterans' Advisory Committee on Environmental Hazards and its Scientific Council is constituted contrary to the requirements of the Radiation Exposure Compensation Standards Act and Order that the Administrator of Veterans Affairs properly constitute said bodies;

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[2] Evaluations of two of the petitioner's four studies were ultimately published. Publication however came only after strong and vigorous encouragement from staff counsel at the Court of Appeals during the Circuit Court's pre-argument conference and after the preparation and service upon the defendants of the Petitioner's Court of Appeals Brief. Moreover, the two published evaluations were flawed because they were not carried out in accordance with the requirements of the Act in that they were not prepared after receipt by the Administrator of the relevant advice of the Radiation Panel of the Scientific Council and the advice which did serve as the basis for their proffered evaluation resulted from an improper and unconstitutional review process as set forth herein.

(2) An Order that the Veterans Administration proceed with evaluations of his four scientific studies referenced herein and specifying that Court retain jurisdiction in this case so as to insure the adequacy and good faith of each of said evaluations;

(3) An Order declaring null and void the findings and evaluations of the Veterans Advisory Committee on Environmental Hazards relating to the scientific studies entitled, "*Do Atomic Veterans Have Excess Cancer? Conclusive New Evidence on Radiation Hazards*", and "*Additional Information on the Risks of the Servicemen Exposed to Fallout from Atmospheric Nuclear Weapons Tests*";

(4) An Order that the Scientific Council of the Committee and its radiation panel make applicable findings and evaluations with respect to his four studies including a finding that a statistical review of the Plumbbob test series shows that there is excess digestive, respiratory, leukemia, and other cancers for veterans who received exposure of 300 millirems of radiation or more and that said veterans have a 62% greater chance than veterans who did not receive such exposure of having cancer; and

(5) An Order that the Veterans Advisory Committee on Environmental Hazards, when properly constituted, recommend to the Administrator of Veterans Affairs of the Veterans Administration that it develop and apply compensation standards and procedures so that Plumbbob veterans who were exposed to at or above 300 millirem of radiation and who develop or have developed digestive, respiratory, leukemia, and other cancers receive all applicable veterans compensation including disability compensation and death benefits to their families and/or to their survivors.

On December 6, 1987, the government filed an omnibus Motion to Dismiss asserting that[3], *inter alia*, Dr. Bross lacked standing to bring his lawsuit and that he had no constitutionally protected rights with respect to the matters raised in his litigation.

The District Court's March 30, 1989 decision agreed that, *inter alia*, Dr. Bross did not have standing to prosecute his case and that his allegations did not set forth violations of a constitutionally protected property interest.

On appeal, the United States Court of Appeals for the Second Circuit held in a decision issued on November 17, 1989 that the Petitioner did not have the standing to pursue this case and agreed with the District Court that Dr. Bross' Due Process rights had not been violated.

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[3] It was pointed out to the lower Court that the government's Motion to Dismiss made inappropriate reference to Rule 56. Rule 56 is the Summary Judgment provision of the Federal Rules of Civil Procedure and so is not relevant for a Motion to Dismiss. Because of this, and because the government denomenated the Motion as one to Dismiss and not one for Summary Judgment, the motion was treated as a Motion to Dismiss. At the same time, because the government included the affidavit of Frederick Conway III, as part of the motion papers, Dr. Bross's papers below included an affidavit of himself relative to the issues raised in the Motion to Dismiss.

It was also pointed out to the lower Court that a Motion for Summary Judgment on all of Dr. Bross's claims was premature. This was because the government had not filed the administrative record, and because, given the pendency of the Motion to Dismiss and the work involved therein, Dr. Bross did not have an opportunity to conduct discovery to insure that all relevant documents and information would be before the Court for a determination on such a motion.

In this regard, the plaintiff advised the lower Court that in the event the Court believed it appropriate to consider the government's papers as setting forth a Motion for Summary Judgment, he wished to be notified thereof and to have an opportunity to prepare and submit additional papers in opposition to such a motion.

Facts

Petitioner Irwin D. Bross, Ph.D., is the President of Biomedical Metatechnology, Inc., Buffalo, New York, and resides at 109 Maynard Drive, Eggertsville, New York. He has a Bachelor's degree in Mathematics from the University of California at Los Angeles, a Master's degree in Experimental Statistics from the North Carolina State University, and a Ph.D. degree in Experimental Statistics from the University of North Carolina at Chapel Hill. Dr. Bross has taught and/or conducted statistical research on cancer and the ability of low level ionizing radiation to cause that disease and other adverse health conditions at the Johns Hopkins University, the Cornell University Medical College, the Sloan Kettering Institute, the State University of New York at Buffalo and the Roswell Park Memorial Institute. During the period 1959 until his retirement in 1983, he was the Director of Biostatistics at the New York State Department of Health's Roswell Park Memorial Institute. Dr. Bross is a longstanding fellow of the American Statistical Association, the American College of Epidemiology, the American Association for the Advancement of Science and a member of the Biometric Society. He is also the author of four books, including *Design for Decision; Scientific Strategies in Human Affairs: To Tell the Truth; Scientific Strategies to Save Your Life; and Crimes of Official Science; A Casebook*; and the author or co-author as well of more than 350 publications and/or articles relating to biostatistics, epidemiology, cancer research, public health, and/or linguistics and including ones on the effect on health of exposure to low level ionizing radiation.

Since 1985, Dr. Bross has written four scientific studies relating to the adverse health effects of exposure to ionizing radiation. These studies are:

1. Do Atomic Veterans Have Excess Cancer—Conclusive New Evidence on Radiation Hazards;

2. Additional Information on the Risks of the Servicemen Exposed to Fallout from Atmospheric Nuclear Weapons Tests;

3. Excess Cancer Among Soldiers at the 1957 Atmosphere Nuclear Weapons Tests in Nevada (published in the May 1987 issue of the American Statistician, the Official Journal of the American Statistical Society); and

4. Do Atomic Veterans Have Excess Cancer? New Results for Correcting the Healthy Soldier Bias (published in the December 1987 issue of the American Journal of Epidemiology).

These studies concern the effects of ionizing radiation on U.S. armed services personnel. In this regard, between 1951 and 1957, the United States government deliberately and intentionally exposed at or about 48,148 members of the United States Armed Forces to low level ionizing radiation during five nuclear weapons test series. The test series were code-named Greenhouse (1951), Upshot Knothole (1953), Castle (1954), Redwing (1956) and Plumbbob (1957). The Upshot-Knothole and Plumbbob test series were conducted in the United States' Nevada Proving Grounds. The Greenhouse, Castle, and Redwing series took place in the United States Pacific Proving Grounds at Enewetak and Bikini.

The Plumbbob series involved 30 atmospheric nuclear weapons shots and approximately 13,685 soldiers. An analysis by the United States Center for Disease Control in 1979 of one of the Plumbbob shots, test shot "Smoky", indicated that the group of persons identified as being exposed to low level ionizing radiation as a result of that test subsequently developed leukemia at a statistically significant rate approximately 230% higher than anticipated. Excess leukemia among those exposed to ionizing radiation as a result of that test shot was confirmed by an analysis released by the National

Research Council of the National Academy of Sciences in June of 1985. This latter analysis also indicated that the highest incidence of excess leukemia among Smoky participants was apparent in that cohort of persons who received at or above 300 millirems of radiation.

Dr. Bross's scientific studies show that, *inter alia*:

(A) A reanalysis of the data in the 1985 National Research Council report on the mortality of armed services nuclear weapons test participants, when corrected for a serious selection bias, shows *inter alia*, that at atomic test series Plumbbob, there is excess digestive, respiratory, leukemia and other cancers among those veterans exposed to at or above 300 millirems of ionizing radiation. The analysis also provides internal evidence to suggest that radiogenic and non radiogenic diseases are clearly distinguished, and demonstrate that existing data does provide a valid basis for providing fair compensation to the atomic veterans.

(B) Mathematical models can be constructed which will provide cancer risk estimates for individual servicemen who were exposed to atomic fallout so as to provide information as to the extent to which his/her injury and/or death was caused by exposure to atomic radiation and which can then be submitted to the Veterans Administration in support of veterans' compensation claims.

(C) A reanalysis of the 1985 National Research Council report on the mortality of nuclear weapons test participants, when corrected for a statistical "healthy soldier bias", also shows 62% excess cancers (including respiratory, digestive, leukemia, and other cancers) among soldiers who had exposures to fallout of 300 millirems or more at the Plumbbob atmospheric nuclear test series. On the basis of this, the Veterans Administration is able to award claims and provide compensation to Plumbbob veterans who have been harmed by their

> exposure to atomic fallout. The findings set forth therein also show the urgent need to reevaluate official risk estimates for radiological and chemical mutagens which in some cases are and have been underestimated by several orders of magnitude;

Consistent with the requirement of the Act and its implementing regulations, Dr. Bross submitted two of his studies to the Veterans Administration and to the Veterans Committee on Environmental Hazards for review, consideration, and evaluation in 1985 and 1986.

In its November 1986 meeting, the Advisory Committee reviewed and considered these scientific studies and determined that they provided no basis for a change in the current Veterans Administration compensation procedures for veterans exposed to ionizing radiation from atmospheric nuclear weapons tests and setting forth claims of service-connected disability with respect thereto.

In its November 1986 meeting, the Committee reviewed and considered these scientific studies. The Committee determined that they provided no basis for a change in the current Veterans Administration compensation procedures for veterans exposed to ionizing radiation from atmospheric nuclear weapons tests and setting forth claims of service connected disability with respect thereto.

The Committee's consideration of Dr. Bross's studies violated the Act, its implementing regulations, used inappropriate procedures, was otherwise unlawful, and violated the petitioner's constitutional rights.

In particular, the Veterans Administration failed to forward Dr. Bross's studies to the Radiation Panel of the Scientific Council for review and comment as required by the Act. See Act at Section 6(d)(2).

Moreover, the Scientific Council failed to evaluate Dr. Bross' studies, make findings relating thereto, and forward those findings to the Committee and to the Administrator as it was required to do under the Act. See Act at Section 6(d)(2), (3).

Importantly, the government admitted and conceded in the Courts below that Dr. Bross' studies should have been properly referred, evaluated, and published and that they were not. In this regard, the government conceded and admitted that the plaintiff's four scientific studies fall within the areas of review responsibility of the Act and the government therefore conceded that the Council had a statutory responsibility to review and make findings with respect to the studies in accordance with the Radiation Exposure Act and that the Administrator was required to publish evaluations of those studies. The government further conceded and admitted that the Scientific Council of the Veterans Advisory Committee on Environmental Hazards did *not* normally have separate and independent meetings from the Committee and that the Radiation Panel of the Scientific Council did *not* report to the Advisory Committee.[4]

Finally, the government conceded that the Administrator had not published the required evaluations of the Petitioner's studies in the Federal Register.[5,6]

The facts presented also show that the review of Dr. Bross' studies by the Committee and the Veterans Administration were improperly carried out because:

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[4] For all practical purposes, and but for the matters raised in its Motion to the lower Court, the government thus conceded outright to the lower Court the validity of Dr. Bross's First and (much of) the Second Causes of Action.

[5] Thus, and but for the matters raised in the Motion to Dismiss, the government essentially conceded the validity of those facts set forth in Dr. Bross's third, fourth, and fifth Causes of Action and thus admitted the validity of those Causes of Action.

[6] See Footnote 2, above.

(1) the major Committee reviewers of his studies did not possess the requisite expertise to comment on them;

(2) the Committee and/or the Veterans Administration solicited non-Committee members to review and comment upon the studies and circulated among Committee members misleading, erroneous and libelous statements about Dr. Bross and/or his studies,

(3) the Committee and the Agency failed to advise Dr. Bross that its meeting whereat it reviewed his studies was open to the public;

(4) the Committee withheld from him reviews of and comments on his studies which were presented and relied upon at the November 1986 Committee meeting;

(5) the Committee failed to prepare a contemporaneous transcript of the meeting at which Dr. Bross' studies were discussed[7]; and

(6) the membership of the Committee did not comply with the membership requirements of the Radiation Exposure Act and/or its implementing regulations, and its membership included inappropriate persons.

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[7] That this prejudiced Dr. Bross is underscored by the many "inaudibles" present in the reconstructed "transcript" of the November meeting of the Committee included as part of the Conway declaration.

REASONS FOR GRANTING THE WRIT

I. The Second Circuit's holding that the petitioner does not have standing is inconsistent with the Court's previous decisions relating to standing and the decisions of the District of Columbia and the Eighth Circuits.

The Courts below held that the petitioner lacks standing to bring his claims. The Second Circuit held that the petitioner did not fall within that class of persons protected by the Act and upheld, *sub silentio,* the District Court's holding that the Petitioner had alleged no legally cognizable "injury in fact".

Standing has both a "constitutional" and a "prudential" dimension. See *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 471, 102 S.Ct. 752, 758 (1982), *Warth v. Seldin,* 422 U.S. 490, 498, 95 S.Ct. 2197, 2204 (1975). Evaluated from both of these perspectives, Dr. Bross has the standing to commence his lawsuit and the lower Court's holdings must be reversed.

Reversal of the Circuit Court's holding is important for it will establish a precedent which can be relied upon to provide those who have been, are, and will be adversely affected by the defendants' administrative processes and practices to have access to the basic and essential right of judicial review of adverse agency action. This is no insignificant right. Since the passage of the Act, a multitude of scientific studies have been considered, reviewed, disposed of and rejected ostensibly in the name of the processes and structure established thereby.

A) The Conclusion That The Petitioner Has Not Been Injured in Fact in This Case is Contrary to the Major Standing Decisions of This Court and Including *Valley Forge, Investment Company Institute, Data Processing, Sierra Club and Barlow,* as Well as Numerous Other Decisions of the Circuit Courts.

From a *constitutional* point of view, Supreme Court doctrine requires for standing that the petitioner "show that he personally has suffered some actual or threatened

injury as a result of the putatively illegal conduct of the defendant, that the injury fairly can be traced to the challenged action and (that it) is likely to be redressed by a favorable decision." *Valley Forge, supra*, 102 S.Ct. at 758 (citations omitted).[8]

Except in taxpayer suits, there need be no nexus between the injuries relied on for Article III standing and the claim of right. It is sufficient that relief on the statutory claim will prevent or redress the injury. *Duke Power Company v. Carolina Evn. Study Group*, 438 U.S. 59, 78-81 (1978).

Dr. Bross' has been injured in this case as a result and because of the defendant's conduct, and by an injury which can be redressed by the defendants.

Dr. Bross's injuries include the following:

(a) the failure of the Veterans Administrator to publish evaluations of his studies as required by law[2];

(b) the failure of the Veterans Administration to forward to the Radiation Panel of the Scientific Council his studies for review and comment as required by law.

(c) the Committee's decision that his studies provided no reason to modify the Veterans Administration's existing guidelines for adjudicating veterans claims for service connected, radiation induced injuries.

(d) the failure of the Scientific Council to, as required by law and regulation, evaluate his studies, make findings relating thereto, and forward those findings to the Committee and to the Administrator.

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[8] There is no dispute in this case that Dr. Bross satisfies the remaining two prongs of the constitutional standing test: that the demonstrated injury is the result of actions taken by the defendants and that he will benefit from the remedy requested. In this regard, the complaint makes clear that the injuries discussed above are caused by and are the result of the actions of the defendants. Secondly, the relief Dr. Bross requests (*supra*) is within the power of the Court to grant and would provide him with exactly that which he has been unlawfully deprived.

[2] See Footnote 2, above.

(e) The improper and unlawful review of Dr. Bross's studies by the Committee and the Veterans Administration including the fact that, *inter alia*:

(1) the major reviewers of his studies did not possess the requisite expertise to comment on his studies;

(2) the solicitation of non-Committee members to review and comment upon his studies and the circulation among Committee members of misleading, erroneous and libelous statements about him and/or his studies;

(3) the failure of the Committee and the Agency to advise him that its meeting whereat it reviewed his studies was open to the public;

(4) the withholding from him of reviews and comments on his studies which were presented at and relied upon at the Committee meeting where his studies were discussed;

(5) the failure of the Committee to prepare a contemporaneous transcript of the meeting at which his studies were discussed; and

(6) the failure of the Committee membership to be in compliance with the membership requirements of the Radiation Exposure Act and/or its implementing regulations, and its inclusion of inappropriate persons on the Committee.

(f) due process violations regarding the review and evaluation of his studies and as set forth in (e), above.

These injuries without a doubt give rise to the case and controversy required by the Article III standing component. See *Investment Company Institute v. Camp*, 401 U.S. 617, 620, 91 S.Ct. 1091, 1093 (1971), *Data Processing Service v. Camp*, 397 U.S. 105, 153-54, 90 S.Ct. 827, 830 (1970).

In the face of all of this, the District Court's characterization of the petitioner's injuries as not "personal" and "highly speculative", and the Second Circuit's *sub silentio* affirmance thereof is difficult to understand and clearly ignores the detailed wrongs imposed upon Dr. Bross by the defendants.

Furthermore, any argument that procedural and statutory wrongs and determinations are too ethereal for consideration and that standing is limited to physical and/or financial injury is inconsistent with and flies in the face of Supreme Court law. Standing is a very broad concept; the types of injuries which it protects are broadly encompassing. See *Data Processing, supra*, 90 S.Ct. at 830, See also *Sierra Club v. Morton*, 465 U.S. Ct. 727, 734-35, 92 S.Ct. 1361; 1366 (1972). There are many Circuit Court cases which stand for the proposition that violation of a person's statutory and/or procedural rights provides one with cognizable standing. See *e.g., Doe v. Blum*, 729 F.2d 186, 189 (2nd Cir. 1984); *National Conservative Political Action Comm. v. FEC*, 626 F.2d 953, 957-58 (D.C. Cir. 1980); *Committee for Full Employment v. Blumenthal*, 606 F.2d 1062, 1064-66 (D.C. Cir. 1979); *Ellis v. U.S. Dep't. of Housing and Urban Development*, 551 F.2d 13, 16 (3rd Cir. 1977); *Gardner v. F.C.C.*, 530 F.2d 1086, 1090-91 (D.C. Cir. 1976); *Pickus v. U.S. Board of Parole*, 507 F.2d 1107 (D.C. Cir. 1974). And certainly, when one's constitutional rights are violated a right to sue exists. See *Laird v. Tatum*, 408 U.S. 1, 10-13, 92 S.Ct. 2318, 2324-25 (1972), *Larry v. Lawler*, 605 F.2d 954, 962-63 (7th Cir. 1978); *Matos v. Secretary of HEW*, 581 F.2d 282, 286 n.6 (1st Cir. 1978), *Albert Elia Bldg. Co., Inc. v. Sioux City*, 418 F.Supp. 176, 178 (N.D. Iowa 1976).

However, and beyond this, the actions of the defendants have deprived Dr. Bross of income, status, and recognition. The Supreme Court is clear that impairment of economic, financial, and professional interests are also sufficient to confer standing. See

Barlow v. Collins, 397 U.S. 159, 161-65, 90 S.Ct. 832, 835-36 (1970), *Data Processing, supra*, 397 U.S. at 151, 90 S.Ct. at 829, *Sierra Club, supra*, 92 S.Ct. at 1365 and cases cited at n.6 thereat, *Bowsher v. Synar*, 106 S.Ct. 3181, 3186 (1986), *Wright v. Allen*, 104 S.Ct. 3315, 3326-3327, 3328 n.22. Accord, *U.S. v. Briggs*, 514 F.2d 794, 797-799 (5th Cir. 1975).

B) The Second Circuit's Conclusion That The Interest Asserted By Dr. Bross is Not Within The Zone of Interests of the Veterans' Dioxin and Radiation Exposure Compensation Act Is Inconsistent With and Contrary to The Court's Policies With Respect To Standing Enunciated By the Court in *Clarke, Valley Forge, Data Processing, Investment Company Institute, Block, Barlow,* and Other Cases And Of Relevant Holdings of the District of Columbia and Eighth Circuit Courts of Appeals.

The "*prudential*" dimension of standing is also satisfied in this case. This Supreme Court principle requires that (1) a plaintiff assert his own legal rights and interests and not rest his claim on the rights of third parties, (2) a plaintiff refrain from litigating "abstract questions" amounting to "generalized grievances" and (3) a plaintiff's complaint "falls within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." *Valley Forge, supra*, 102 S.Ct. at 760.

The circumstances and facts of this case make it clear that Dr. Bross asserts his own procedural and substantive rights and that he raises specific claims regarding particular statutory, regulatory, and constitutional violations of law as it relates to him.

The Second Circuit rests its conclusions that Dr. Bross fails to meet the prudential standing test on the argument that "the Act is chiefly centered around the procedures for awarding VA compensation . . . (and that) the interest of a scientist like Dr. Bross in seeking professional and governmental recognition of his views . . . is not reasonably connected to the awarding of VA benefits to fall within the Act's zone of interests".

The Supreme Court has recently analyzed the "zone of interest" test. See *Clarke v. Securities Industry Ass'n.*, 479 U.S. 388, 107 S.Ct. 750 (1987). The Court there reiterated that relevant cases in this area approved a "trend ... toward (the) enlargement of the class of people who may protest administrative action" (*Clarke, supra*, 107 S.Ct. at 756), reiterated the point that it is sufficient for standing that a person's interest be only "arguably" within the zone of interest of the relevant statute (*Data Processing, supra*, 90 S.Ct. at 829, *Investment Co., supra*, 91 S.Ct. at 1094, *Clarke, supra*, 107 S.Ct. at 756), recognized that there is a "presumption in favor of judicial review of agency action" and that it is overcome only when Congressional *intent to preclude* judicial review is "fairly discernible in the statutory scheme"; and held that the zone of interest test "is not meant to be especially demanding" (*Clarke, supra*, 107 S.Ct. at 757).

According to the Court, the inquiry is an assessment of "whether Congress intended for a particular class of persons to be relied upon to challenge agency disregard of the law." *Clarke, supra*, 107 S.Ct. at 757. In answering this question, one is not to look at the person *qua* person. The Supreme Court held in *Clarke* that "there need be no indication of congressional purpose to benefit the would-be plaintiff" in determining whether Congress intended to permit the suit. *Clarke, supra*, 107 S.Ct. at 757. The relevant focus is on the interests of the person and whether or not the relevant statute is explicitly structured to indicate that the person is *not* to have access to the Courts with respect to the matter at issue. See *Clarke, supra*, 107 S.Ct. at 759, *Block v. Community Nutrition Institute*, 467 U.S. 340, 347, 104 S.Ct. 2450, 2454 (1984), *Investment Company Institute, supra*, 91 S.Ct. at 1093-94, *Data Processing, supra*, 397 U.S. at 153-158, 90 S.Ct. at 830-33, *Barlow, supra*, 90 S.Ct. at 838, *Doe v. Blum*, 729 F.2d 186, 189 (2nd Cir. 1984).

The Supreme Court is clear that the zone of interest test "denies a right of review (only) if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit". *Clarke, supra*, 107 S.Ct. at 757.

Moreover, when as here, the construction involves the standing related provisions of the APA, the "zone of interest" test is to be viewed and interpreted "generously." See *Clarke, supra*, 107 S.Ct. at 758 n.10, citing *Data Processing, supra*, 397 U.S. at 156, 90 S.Ct. at 831.

From this discussion of Supreme Court law, it should be clear that, contrary to the position suggested by the Circuit Court, standing is *not* to be decided by the identification of the "primary beneficiary under the relevant statutory program". The issue instead, is whether the interest the claimant asserts and represents are among those interests arguably protected under the relevant statutory program.

The terms of the Act reveal a clear and direct relationship between scientific studies like the Petitioner's and the goals of the statute. The Act manifests Congressional recognition that the determination of adverse health effects many years after exposure is marked by exceptional uncertainty and acknowledges that this uncertainty has worked *against* the award of benefits by the Veterans Administration for serious disabilities.[10] See *e.g.* Section 2(2), House Report No. 98-592 reported at *1984 USC Cong. and Adm. News* pp. 4453, 4454 attached at pages 19a-37a in the Appendix to this Brief.

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[10] Statistics provided counsel to the Petitioner by the Veterans Administration and part of the record below indicate that during the period 1978 to date, 6,000 claims asserting disability based on exposure to ionizing radiation were filed and that of those, the VA approved only 2. Similarly, the VA indicated that it had no record of the number of claims that have ever been filed but states that only a total of 25 such disability claims have ever been approved.

The Act's premise is that scientific evidence is necessary to reduce the uncertainty and increase the likelihood of disability awards. To do that, the Act "calls in" the scientific community to assist in achieving its goals by undertaking scientific studies of the connection between exposure and health effects and providing such studies to the government. The Act in turn imposes on the Administrator an elaborate set of obligations and procedures for addressing these studies and makes it absolutely clear that the Administrator and the defendants may not informally dismiss or ignore them.

Review of the statute compels the conclusion that scientific studies like the Petitioner's are the "critical means" for dealing with the problem of uncertainty and the adverse effects of such uncertainty on the adjudication of benefit claims. Consideration of scientific studies is a *prescribed duty* of the Administrator under the Act and it is that mandate which creates a zone of interests.

In this case then, the relevant interest that standing depends on is that of a scientist whose study of the relationship between exposure and health effects has been considered in an agency proceeding pursuant to statutory mandate. As such, petitioner scientist is a member of a group which Congress has identified in the Act as critical to the achievement of its purpose. Thus, the petitioner's interests are identical to the values promoted by and in the Act.

Moreover, petitioner's acknowledged right to present his scientific studies to the agency and his right to have those studies considered is participation of a nature that implies an interest sufficient to provide for standing to seek judicial review. This is particularly relevant where as here the issues for which judicial review are sought are related to the statutory right of participation, *See NWRA v. Finch*, 429 F.2d 725 (D.C. Cir. 1970).

Providing petitioner scientist with standing makes eminent sense because it places the control of judicial review of agency action in the hands of people closely related to the goals and operation of the statute. Moreover, acknowledging standing to the petitioner with respect to this statute poses no threat of unfairness in holding later litigants to a decision in this case.

With this in mind, the critical and important question raised by this case is whether the duties imposed on the defendants relative to considering and making use of scientific studies are enforceable obligations. And the question of whether a scientist who has participated in an administrative proceeding under the Act has standing to obtain judicial review of the administrative review and procedures is in the final analysis a question of the reviewability of agency action. In this regard, if petitioner scientist's interest in compelling conformity with the rulemaking provisions governing the consideration of scientific studies is not within the zone of interest protected by the statute, then no one has a qualifying interest in enforcing these statutory provisions.[11] In such circumstances, the Administrator's and the administrative disregard of scientific studies and the procedures applicable to them becomes final and *unreviewable* agency action.

This result, while mandated by the Circuit Court's disposal of this case is inconsistent with and contrary to the well-established "presumption of reviewability"

[11] Any attempt by a "Veteran" to litigate a claim such as the petitioner's is illusionary for he/she would be met at the threshold with the position that the challenge was premature. His challenge would be premature until such time as a claim for disability benefits was filed and he can show that the challenged action adversely affected his claim in a concrete way. In such a proceeding, the issue would quickly become whether the particular claimant was entitled to particular disability benefits on the facts of the individual case. Any such "complaining veteran" would face additional difficulties because under the 1988 amendments of Title 38 decisions in adjudicatory proceedings are reviewable only in the Court of Veterans Appeals, a purely administrative tribunal.

under the Administrative Procedure Act and required by this Court pursuant to the policies laid down in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 139-41, 87 S.Ct. 1507 (1967); *Clarke, supra*, 479 U.S. at 399-400.

Nonreviewable administrative action in this case is particularly inappropriate. This is because the Act itself is a Congressional expression of dissatisfaction with the VA and administrative lack of response to veterans' claims for disability based on exposure to ionizing radiation. The Act here has sought to increase the level of administrative awareness and responsiveness by imposing on the defendants here an elaborate process to ensure full and careful consideration of scientific studies and the duty to act on such studies in establishing standards and guidelines unless there is defensible reasons to reject the learning in such studies. Therefore, the unreviewable agency discretion to interpret and implement the Act as is administratively pleasing significantly undermines the legislative purpose behind the Act and the program constructed by it. Moreover, such an outcome is contrary to the marked trend favoring judicial review so as to insure administrative accountability in circumstances where agency bias arising from its mission or past practice threatens legislative objectives.

It is further relevant that the terms of the Act do not provide any reason to discard the Supreme Court presumption of judicial review. To the contrary, the statute in relevant part suggests that its enforcement is not to be limited to "Veterans with radiation-induced cancer." In particular, the Act at Section 5(c)(1) requires "public review and comment" on proposed regulations and/or amendments issued in accordance with that statute. The petitioner is, of course, a member of the public.

The 1988 Amendments to the Veterans Administration Statute at 38 U.S.C. Section 211 *et. seq.* provide additional authority in support of the presumption of

reviewability under the APA with respect to determinations of the Veterans Administration. Such amendments explicitly provide that VA determinations in rulemaking, rulemaking and related procedures are susceptible to judicial review in a federal court. See 38 U.S.C. 211, 223.

It matters not that this law appears in Section 5(c) of the Act and in other Veterans statutes and not in those provisions specifically relevant here. In determining whether a statute leaves persons in or out, it is appropriate to look at the entire statutory text. See *Clarke, supra*, 107 S.Ct. at 758.

Finally, this is not a case where the questions arising for which review are sought are within the narrow band of agency determinations that are "beyond the keen and competence of the Courts". In fact this is clearly not the case as the Congress has taken steps in the statute to remove the sole consideration of these matters from the agency by providing and setting forth therein the rulemaking process which the Petitioner has participated in.

Given the congruence between the petitioner's interest and the explicit purposes of the Act, the Second Circuit's reliance on *Clarke* is misplaced and not consistent with Supreme Court law.

The District of Columbia and the Eighth Circuit Courts of Appeals have also held in appropriate circumstances that the "zone of interest test" should be construed in a manner which would allow standing here. See *e.g., Hazardous Waste Council v. EPA*, 861 F.2d 277, 281-86 (D.C. Cir. 1988); *National Coal Ass'n. v. Hodel*, 825 F.2d 523, 526-27, 529-31 (D.C. Cir. 1987); *DeLoss v. HUD*, 822 F.2d 1460, 1462-66 (8th Cir. 1987); *Investment Co. v. FDIC*, 815 F.2d 1540, 1543-46 (D.C. Cir. 1987).

C) The Lower Courts have ignored this Court's Principles of "*jus tertii*" Standing And As Set Forth in Cases Such As *Munson* and *Craig v. Boren* And As Implemented, For Example, In Circuit Courts and Including The District of Columbia Circuit.

Assuming arguendo that Dr. Bross' interests are not among those protected by the Act, the Supreme Court-constructed principles of third party standing, or "*jus tertii*", provide him with the ability to raise the matters at issue in this lawsuit. See *Maryland v. Munson*, 104 S.Ct. 839, 2845-48 (1984), *Craig v. Boren*, 97 S.Ct. 451, 455-46 (1976). It is relevant here that Veterans aggrieved by the refusal of the defendants to comply with the statute would face severe practical problems and obstacles in litigating this case and others like it because of a lack of specialized expertise relating to statistics, epidemiology and appropriate scientific methods. Such a consideration is relevant in determining whether a party has third party standing. See *FAIC Securities Inc. v. United States*, 768 F.2d 352, 360 (D.C. Cir. 1985) (Decision by Justice Scalia). The petitioner is exceptionally skilled, trained, and talented in this area, and so he can be expected to "properly frame the issues and present them with the necessary adversarial zeal." *Munson, supra*, 104 S.Ct. at 2846.

Veterans would face other practical problems as well including as discussed above, their lack of access to the Courts. This provides another reason for providing the petitioner with third party standing on their behalf.

Moreover, and as is required in third party standing cases, the direct interests of the plaintiff here are less important than the interests of the non-party veterans; the third party plaintiff's action serves the non-party veterans interests as well as his own; and providing third party standing to the petitioner is here an appropriate means of enforcing the right in question.

II. The Second Circuit's holding that the petitioner's claims set forth no interest protected by due process ignore this court's seminal decision in *Board of Regents v. Roth* and decisions of applicable circuit courts.

In response to the Petitioner's proof that the actions of the defendants with respect to the (lack of) review of his scientific studies deprived him of due process in violation of the Fifth Amendment of the Constitution, the Second Circuit Court of Appeals held that the petitioner had set forth no constitutionally "protected property interest." The Circuit Court of Appeals' decision was premised on its reading of the meaning and interpretation of this Court's decision in *Board of Regents of State College v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972).

The Second Circuit Court's holding is erroneous. More specifically, it is in conflict and not in agreement with the relevant Supreme Court authority in *Roth* and its progeny.

Dr. Bross' due process claims are twofold in this case. First, Section 6(d)(3) of the Act provides him with the "legitimate claim" to be entitled to obtain from the Scientific Council *Findings and Evaluations* of his scientific studies for presentation to the Committee and to the Administrator. Simply put, the required "findings" and "evaluations" of his scientific studies by the Council are benefits and/or entitlements in which Dr. Bross has a property interest. The Petitioner has such an interest in these because they are *required* to be provided in accordance with the terms of the Radiation Exposure Act. See Act at Section 6(d)(2), (3). Moreover, these statutorily required Findings and Evaluations are clearly different from circumstances where persons merely possess an "abstract need or desire" or "unilateral expectations" of receiving something. See *Roth, supra*, 408 U.S. at 577, 92 S.Ct. at 2709 (1972).

The Petitioner thus has a protectable property interest. See generally, *Roth, supra*, 92 S.Ct. at 2709, *Foxman v. Renison*, 625 F.2d 429, 432 (2nd Cir. 1980) cert. denied, 10 S.Ct. 530 (1980), *Calloway v. Block*, 763 F.2d 1283, 1290 (11th Cir. 1985), *Zucker v. U.S.*, 758 F.2d 637, 639 (Fed. Cir. 1985), cert. denied, 106 S.Ct. 129 (1985).

Importantly, there is nothing in *Board of Regents v. Roth, supra*, or other relevant caselaw to suggest or otherwise indicate that Dr. Bross's statutory benefit and/or entitlement under the Act are not deserving of, and do not merit, due process protection. They do. Published evaluations of, and findings related to, a scientist's scientific studies are no less meaningful or important to him than is employment or shelter to others. In fact, since the content of such evaluations and findings impact on one's scholarly reputation and scientific competence, such findings and evaluations do affect one's shelter and employment.

Second, the circulation of erroneous, libelous, and misleading statements at the Committee meeting about the petitioner and his scientific studies which are at issue in this litigation involves an actionable violation of the petitioner's liberty interest as protected by the due process provisions of the Fifth Amendment. This is so because the Committee relied upon these materials in arriving at its findings that Dr. Bross's studies provided no basis upon which to modify the Veterans Administration compensation procedures and so "removed", "extinguished" and/or "significantly altered" his statutory right to obtain impartial Findings and Evaluations of his scientific studies. See *Bartel v. FAA*, 725 F.2d 1403, 1415 (D.C. Cir. 1984).

Conclusion

For the reasons set forth above, Petitioner respectfully prays that a Writ of Certiorari issue to review the November 17, 1989 Judgment and Opinion of the United States Court of Appeals for the Second Circuit with respect to this case.

Dated: Albany, New York
February 14, 1990

Respectfully submitted,

JOHN G. BRENON
Counsel of Record
5530 Main Street
Williamsville, New York 14221
(716) 633-7860

LEWIS STEELE
Counselor at Law, P.C.
Post Office Box 1235
Albany, New York 12201
(518) 854-9582

Attorneys for Petitioner

APPENDIX

Decision and Order of the United States District Court for the Western District of New York Dated March 29, 1989

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CIVIL 87-1167C

IRWIN D. BROSS, Ph.D.,

Plaintiff,

vs.

THOMAS K. TURNAGE, as Administrator of Veterans Affairs for the United States Veterans Administration, *et al.*,

Defendants.

SIR/MADAM: Take *NOTICE* of an ORDER, & a JUDGMENT of which the within is a copy, duly granted in the above entitled action on the 29th & 31st days of March, and entered in the Office of the Clerk of the United States District Court, Western District of New York, on the 30th & 31st days of March.

Dated: Buffalo, New York
March 31, 1989

MICHAEL J. KAPLAN, Clerk
United States District Court
Western District of New York
Buffalo, New York 14202

cc: Lewis Steele, Esq.
Martin Littlefield, AUSA

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CIV-87-1167C

IRWIN D. BROSS,

Plaintiff,

vs.

THOMAS K. TURNAGE, As Administrator of Veterans Affairs for the United States Veterans Administration; THE VETERANS ADVISORY COMMITTEE ON ENVIRONMENTAL HAZARDS; THE SCIENTIFIC COUNCIL OF THE VETERANS ADVISORY COMMITTEE ON ENVIRONMENTAL HAZARDS; and THE UNITED STATES VETERANS ADMINISTRATION,

Defendants.

APPEARANCES:

LEWIS STEELE, ESQ., Buffalo, New York, for Plaintiff.

DENNIS C. VACCO, ESQ., United States Attorney (MARTIN J. LITTLEFIELD, ESQ., Assistant United Attorney, of Counsel), Buffalo, New York, for Defendants.

The defendants have moved to dismiss the present action pursuant to Rules 12 and 56 of the Federal Rules of Civil Procedure.[1]

[1] The defendants' motion is directed to the complaint principally on the standing issue; therefore, the court will address the motion under Rule 12.

On September 4, 1987, the plaintiff filed a complaint asserting six causes of action under the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, 38 U.S.C. §354, note (1988) ("Act"), and the Fifth Amendment to the United States Constitution.

The first cause of action alleges that the Veterans Administration ("VA") violated the Act by failing to publish in the Federal Register its evaluations of two studies submitted by the plaintiff, and by failing to refer the studies to a scientific subcommittee created pursuant to the Act.

The second cause of action requests that the Court issue a writ of mandamus ordering the Administrator of the VA to do both.[2]

The third cause of action states that by determining that the plaintiff's studies provided no basis for modifying existing VA guidelines regarding the adjudication of claims submitted by veterans, and by failing to refer the studies to the aforementioned subcommittee, the VA's Advisory Committee violated the Act by failing to properly "consider, review, evaluate and process" his studies. The third cause of action also alleges that the members of the Advisory Committee were selected in violation of the Act.

The fourth cause of action alleges that the procedures employed by the defendants in considering the plaintiff's studies violated the plaintiff's right to due process of law.

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[2] The second "cause of action" thus does not actually allege a separate claim.

The plaintiff states that he has not submitted two other studies to the VA because to do so would be futile in light of the defendants' actions in regard to his other studies; nonetheless, he is requesting that any review and publication ordered by the Court also include these previously unsubmitted studies.

The fifth cause of action requests that the court issue a writ of mandamus ordering the defendants to "properly consider, review, evaluate and process" his studies.[3]

The sixth cause of action, repeating all previous allegations contained in the complaint, asserts that the plaintiff has a right of action under the Administrative Procedure Act ("APA"), 5 U.S.C. §§702, 704, and charges that the Advisory Committee's conclusions regarding the plaintiff's analysis are arbitrary and capricious, and that they are not supported by substantial evidence.

The defendants claim that the plaintiff lacks standing to bring the present action. They argue that he has failed to demonstrate that any of their actions caused him "injury in fact," or that his complaint falls within the "zone of interests" protected or regulated by the Act, citing, among other cases, *Sierra Club v. Morton*, 405 U.S. 727 (1972), and *Valley Forge Christian College v. Americans United*, 454 U.S. 464 (1982). The defendants also assert that the plaintiff has failed to exhaust all potential administrative remedies, citing the Federal Advisory Committee Act, 5 U.S.C. App. 2, and the APA, 5 U.S.C. §553(e). *See* Item 7 at 16, 19-20, 22-23. In addition, the defendants argue that the plaintiff has no right to sue under the APA, *see* Item 7 at 20-22, and that the plaintiff has failed to identify a property interest to support his due process claim. *See id.* at 23-

[3] The fifth "cause of action" thus also does not state a separate claim.

24. Finally, the defendants argue that, in any event, the Advisory Committee and the scientific subcommittee cannot be sued under the APA. *Id.* at 24-25.[4]

In his response, the plaintiff essentially repeats the actions of the defendants cited in his complaint and asserts that these actions themselves constitute sufficient injury to establish standing, *see* Item 12 at 20-21, although he also asserts that as a result of the defendants' actions he has been deprived of income, status, and recognition. *See id.* at 23.[5] He then asserts that "the objective and lawful evaluations of [his] studies" is the "interest which this lawsuit is all about," *id.* at 26, and that he has a property interest in the "findings" and "evaluations" of the scientific subcommittee. *Id.* at 46. *See also* Item 13 at ¶¶12, 23, 36, 37, 54-57, 64-69. In any event, he argues, he should be granted standing as a third party attempting to protect the interests of veterans. *Id.* at 28.

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[4] The defendants also contend that the Administrator does intend to publish the plaintiff's studies. *See* Item 7 at 10.

To put it mildly, the court is puzzled by the Administrator's lack of attention to this requirement. It seems that there is no reason why the plaintiff's studies could not have been published some time ago. It is true that the statute and the regulation give the Administrator much discretion; however, although the letter of the law may not have been violated, it appears that the spirit of the law has been breached.

[5] The plaintiff also claims that the Advisory Committee committed an "actionable violation of [his] liberty" by circulating "erroneous, libelous, and misleading statements" about him at one of its meetings, *see* Item 12 at 47, and that the defendants' delay in properly reviewing and publishing his studies is itself actionable conduct. *Id.* at 30.

BACKGROUND

The plaintiff has a Ph.D. in Experimental Statistics and is President of Biomedical Metatechnology, Inc., of Buffalo, New York. He has conducted statistical research on cancer and the capability of low-level ionizing radiation to cause cancer, and has written extensively on biostatistics, epidemiology, and cancer research. The basis of his complaint is that his opinion was not accepted by the VA's Advisory Committee, and that the Administrator of the Veterans Administration did not embrace his studies and modify existing regulations accordingly. The plaintiff asserts that the Act provides support for the relief he seeks.

The Act requires the Administrator of the Veterans Administration to establish guidelines and standards for the resolution of claims for benefits arising from radiation exposure, and to provide for the evaluation of scientific studies relating to the possible increased risk of adverse health effects from exposure to ionizing radiation. These evaluations are to be made after receiving the advice of the Scientific Council of the Veterans' Advisory Committee on Environmental Hazards, and the evaluations are required to be published in the *Federal Register*. The Act also provides for the creation of the VA Advisory Committee and requires the Administrator to specify the factors to be considered in adjudicating claims.

Regulations were issued in 1985 and provided for amendment through a public review and comment process. The Act provides that this may include consideration by the Administrator of the recommendations of the Advisory Committee regarding final regulations and amendments. The Act provides for the membership of the Committee and directs that the

Advisory Committee is to have a Scientific Council comprised of two subcommittees—one directing its attention to dioxin exposure and the other to ionizing radiation exposure. It directs that the Scientific Council is to make findings and evaluations regarding pertinent scientific studies and to submit its findings to the Committee and the Administrator periodically.

In the Act, there is no requirement that the Administrator publish the periodic reports, although it appears that the Administrator is free to do so if he desires. *See* 38 U.S.C. §354, note at sec. (5)(b)(1)(B). The regulations provide a procedure by which the Administrator reviews applications for disability benefits by those who claimed that they were exposed. The regulations also provide that the Administrator shall publish evaluations of scientific or medical studies relating to exposure to ionizing radiation in the *Federal Register* "from time to time." *See* 38 C.F.R. §1.17(a) (1988).

In his complaint, the plaintiff alleges that he has performed studies which evaluated and re-analyzed data that the Council had considered. In his analysis, he disagreed with the Council's report, and concluded that it had a built-in bias that limited the number of veterans found to have been exposed to ionizing radiation. If his re-analysis were adopted, the regulations would have to be amended. He submitted his re-analysis to the Advisory Committee and, at the same time, to the Scientific Council in November of 1986. The plaintiff alleges that he has submitted four scientific studies relating to the adverse health effects of exposure to ionizing radiation. *See* Item 1 at ¶21; *see also* Item 7 at 9. The plaintiff appeared before the Advisory Committee, but the Committee did not accept his re-analysis.

In November of 1986, the Committee reviewed the documents and made findings that the studies provided no reason to modify the existing guidelines. *See* Item 1 at ¶¶49, 75; Item 7 at 9.

The government concedes that the plaintiff's studies have not as yet been published in the *Federal Register*, but asserts that eventually they will be published. *See* Item 7 at 10; Item 8 at ¶6. Furthermore, no changes in the existing regulations are contemplated. *See* Item 7 at 10.

DISCUSSION

On the present motion, the court must accept all of the allegations contained in the complaint as true. It is the plaintiff's burden, however, to show that, as a result of the allegedly illegal conduct of the defendants, he has personally suffered some actual or threatened injury—that is, an "injury in fact," *Valley Forge Christian College v. Americans United*, 454 U.S. at 472-73—that is "distinct and palpable." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Furthermore, he must demonstrate that his complaint falls within the "zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970), *quoted in Valley Forge Christian College v. Americans United*, 454 U.S. at 475.

The interests intended to be addressed by the Act do not include those asserted by the plaintiff. The plaintiff does not claim that he is a veteran who has been exposed to ionizing radiation or who has developed any form of cancer, and the unrelated and highly speculative injuries that he claims to have suffered clearly fall outside the

scope of the Act. The plaintiff thus cannot claim to be a person who has been "injured in fact," or who falls within any "zone of interest" protected or regulated by the Act. *See, e.g., Valley Forge Christian College v. Americans United*, 454 U.S. at 464, 472-75; *Sierra Club v. Morton, supra; Capital Legal Foundation v. Commodity Credit Corp.*, 711 F.2d 253 (D.C. Cir. 1983). Consequently, the plaintiff has failed to establish standing to pursue his claims.

Moreover, examination of the separate causes of action asserted by the plaintiff provides additional grounds supporting this conclusion.

In his first and second causes of action, the plaintiff alleges that he has been injured by the failure to publish his studies in the *Federal Register*. However, the Act does not specify any time frame within which the Administrator must publish an evaluation. The statute requires that once the Scientific Council has made such evaluations, it must report them to the Advisory Committee and the Administrator. Although the regulations require publication, publication must be made only "from time to time." The court trusts that the Administrator will follow the regulations and will eventually publish the studies. But under neither the statute nor the regulation does the court have the power or authority to order the studies published forthwith. The plaintiff thus has suffered no cognizable injury by the failure to publish.

In his third, fourth, and fifth causes of action, the plaintiff, by merely challenging the composition of the Advisory Committee and the Scientific Council, has shown no personal "injury in fact." Furthermore, it appears that Congress has provided for review of the

standards and procedures employed by such purely advisory bodies in the Federal Advisory Committee Act, 5 U.S.C. App. 2. *See generally Metcalf v. National Petroleum Council*, 553 F.2d 176 (D.C. Cir. 1977). *See also National Nutritional Foods Association v. Califano*, 603 F.2d 327, 336 (2d Cir. 1979).

In his sixth and final cause of action, the plaintiff seeks an order of the court finding that the Advisory Committee's conclusions regarding the plaintiff's analysis are arbitrary and capricious, and that they are not supported by substantial evidence. As noted above, the Act permits the Administrator to consider recommendations from an advisory committee as to any possible amendment of the regulations. However, the Administrator is not bound by such recommendations. *See* 38 U.S.C. §354, note at sec. 5(c)(1). *See also* 5 U.S.C. App. 2, §2(b)(6) ("[T]he function of advisory committees should be advisory only, and . . . all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved.") In fact, in the sixth cause of action, the plaintiff challenges the recommendation of the Advisory Committee before it has even been considered by the Administrator and before the Administrator has made a final determination. Consequently, the plaintiff's invocation of the APA is improper. *See generally Valley Forge Christian College v. Americans United*, 454 U.S. at 488 n.24 ("Neither the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III.")

These examples, which are not intended as exhaustive of the deficiencies in the complaint, are further evidence of the plaintiff's failure to establish standing.

Finally, with regard to the claim in his fourth cause of action that the defendants' actions violated his right to due process of law, the plaintiff has failed to establish that he has been deprived of a constitutionally-protected property interest. Indeed, his complaint appears directed to alleged deficiencies in the process *per se* employed by the defendants rather than the deprivation of any constitutionally-protected property interest caused by that process. *Cf. Board of Regents v. Roth*, 408 U.S. 564 (1972).

Accordingly, the defendants' motion is granted, and the complaint is dismissed.

So ordered.

JOHN T. CURTIN
John T. Curtin
United States District Judge

Dated: March 29, 1989

Judgment of the United States District Court for the Western District of New York Dated March 31, 1989

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Case Number: CIV 87-1167C

IRWIN D. BROSS, Ph.D.,

Plaintiff,

vs.

THOMAS K. TURNAGE, As Administrator of Veterans Affairs for the U.S. Veterans Administration, *etc., et al.,*

Defendants.

JUDGMENT IN A CIVIL CASE

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] **Decision by Court.** This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That defendants' motion is granted, and the complaint is dismissed.

March 31, 1989
Date

MICHAEL J. KAPLAN
Clerk

FRANCES MOSTILLER
(By) Deputy Clerk

FILED
89 MAR 31 AM 8:45
U.S. DISTRICT COURT
W.D.N.Y.—BUFFALO

Decision of the United States Court of Appeals for the Second Circuit Dated November 17, 1989

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 235—August Term, 1989

(Argued/Submitted October 26, 1989
Decided November 17, 1989)

Docket No. 89-7531

IRWIN D. BROSS,

Appellant,

—v.—

THOMAS K. TURNAGE, as Administrator of Veterans Affairs for the United States Veterans Administration; THE VETERANS ADVISORY COMMITTEE ON ENVIRONMENTAL HAZARDS; THE SCIENTIFIC COUNCIL OF THE VETERANS ADVISORY COMMITTEE ON ENVIRONMENTAL HAZARDS; and THE UNITED STATES VETERANS ADMINISTRATION,

Appellees.

Before:

OAKES, *Chief Judge*,
KEARSE and ALTIMARI, *Circuit Judges*.

Appeal from a judgment dismissing appellant's claims under the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, 38 U.S.C. § 354, note (Supp. V 1987), and the Due Process Clause of the Fifth Amendment.

Judgment affirmed.

LEWIS STEELE, Albany, NY, *for Appellant.*

DENNIS C. VACCO, United States Attorney for the Western District of New York (Martin J. Littlefield, of counsel), *for Appellees.*

PER CURIAM:

Irwin D. Bross appeals from a judgment of the United States District Court for the Western District of New York, John T. Curtin, Judge, dismissing his complaint pursuant to Fed. R. Civ. P. 12(b)(6). We affirm.

The Veterans' Dioxin and Radiation Exposure Compensation Standards Act ("the Act"), 38 U.S.C. § 354, note (Supp. V 1987), requires the Administrator of Veterans' Affairs ("the Administrator") to establish guidelines for resolving claims involving exposure by service personnel to dioxin or ionizing radiation. *See id.* § 5(a)(1). Under the Act, the Administrator, after receiving the advice of the Scientific Council ("Scientific Council") of the Veterans' Advisory Committee on Environmental Hazards ("the Advisory Committee"), is to evaluate findings of scientific

studies relating to risks of exposure. *See id.* § 5(b)(1)(B). The Act sets forth additional provisions pertaining to procedures for prescribing regulations based upon such scientific evidence, *see id.* § 5(b)(2)-(3) & (c), and to the composition of the Advisory Committee. *See id.* § 6.

The plaintiff, Irwin Bross, has written a number of papers on the link between ionizing radiation and cancer. Dr. Bross's studies essentially have argued that there is a much stronger causal connection between ionizing radiation and cancer than what the Veterans' Administration ("VA") currently recognizes. Dr. Bross has submitted his studies to both the VA and the Advisory Committee for review. Dr. Bross claims that the VA's and Advisory Committee's evaluations of his studies have not complied with the substantive and procedural commands of the Act.

On September 4, 1987, Dr. Bross filed a complaint with the United States District Court for the Western District of New York against the Administrator, the VA, the Advisory Committee, and the Scientific Council. He alleged, first, that the VA and the Administrator unlawfully failed to publish evaluations of his reports; second, that the defendants failed to consider fairly his conclusions; third, that the processes employed by the defendants violated his due process rights; and, fourth, that the defendants' conclusions that Dr. Bross's studies provided no basis for altering current VA policy were arbitrary and capricious.[1] On March 29, 1989, the district court dismissed the complaint, holding, among other things, that Dr. Bross did not have proper standing to bring his claims.

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1 Dr. Bross's complaint sets forth six separate claims for relief. Two of them are requests for mandamus and thus refer to the remedies sought rather than constituting separate claims for relief.

We hold that the district court properly dismissed Dr. Bross's complaint. In pursuing statutory claims for violations of the Act, Dr. Bross alleges that his right to sue stems from the Administrative Procedure Act, which grants the right of judicial review to "[a] person . . . aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702 (1988). A person suing under § 702 must show that the interests he asserts are "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). Judicial review of an agency action will not lie "if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987).

We find that the interest asserted by Dr. Bross is not within the zone of interests protected by the Act. Because the Act is chiefly centered around the procedures for awarding VA compensation, a veteran aggrieved by the VA's refusal to consider scientific evidence potentially relevant to a claim for benefits conceivably could have a right to seek judicial review. However, the interest of a scientist like Dr. Bross in seeking professional and governmental recognition of his views, although unquestionably genuine, is not reasonably connected to the awarding of VA benefits to fall within the Act's zone of interests. Accordingly, we rule that the district court correctly dismissed Dr. Bross's statutory claims.

Additionally, we hold that the district court properly dismissed Dr. Bross's due process claim. It is fundamental that to establish a procedural due process violation, a

plaintiff must show a deprivation of a protected life, liberty or property interest. *See, e.g., Board of Regents v. Roth*, 408 U.S. 564, 570-72 (1972). Dr. Bross has not identified a protected entitlement, nor is one readily discernible from his complaint.

Judgment affirmed.

House Report No. 98-592 reported at 1984 USC Cong. and Adm. News pp. 4453, 4454

P.L. 98-542, see page 98 Stat. 2725

House Report (Veterans' Affairs Committee) No. 98-592, Jan. 25, 1984
[To accompany H.R. 1961]

Cong. Record Vol. 130 (1984)

DATES OF CONSIDERATION AND PASSAGE

House January 30, October 3, 1984

Senate May 22, October 4, 1984

No Senate Report was submitted with this legislation. The House Report (this page) and an Explanatory Statement (page 4170) are set out.

HOUSE REPORT NO. 98-592

[page 1]

The Committee on Veterans' Affairs, to which was referred the bill (H.R. 1961) to amend title 38, United States Code, to provide a presumption of service connection for the occurrence of certain diseases related to exposure to herbicides or other environmental hazards or conditions in veterans who served in Southeast Asia during the Vietnam era, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

* * * * *

[page 3]

Introduction

On April 26 and 27 and July 12, 1983, the Subcommittee on Compensation, Pension and Insurance conducted hearings on the bill, H.R. 1961, introduced on March 8, 1983, by the Honorable Tom Daschle, to authorize temporary monetary benefits, pending the results and receipt of the epidemiological study mandated by Public Law 96-151, for Vietnam veterans who suffer from soft-tissue sarcoma, porphyria cutanea tarda (PCT) and chloracne. The bill, as introduced, would provide a statutory presumption of service-connection for any veteran who served in Southeast Asia during the Vietnam era and who later is shown to have one of the conditions identified in the bill. There would be no time limit for the initial manifestation of the disabilities under the original bill.

Two major veterans' organizations in testimony before the Committee strongly opposed the bill on the basis that there was not sufficient credible scientific evidence to warrant a presumption of service-connection. Other service organizations supported the bill as introduced.

The Subcommittee received testimony from a number of Members of Congress, representatives of the Veterans' Administration, the Department of the Air Force, the Centers for Disease Control (CDC) of the Department of Health and Human Services, the Armed Forces Institute of Pathology, a number of veterans' organizations and from members of the scientific community and other interested individuals.

On July 28, 1983, the Subcommittee adopted an amendment in the nature of a substitute offered by the Chairman of the Subcommittee, the Honorable Douglas Applegate, and recommended the bill, as amended, to the full Committee.

On November 3, 1983, the full Committee adopted an amendment offered by the Honorable John Paul Hammerschmidt, to include benefits for certain veterans who participated in the testing

[page 4]

of nuclear devices or who served in the occupation forces in Hiroshima or Nagasaki immediately after World War II and, by a vote of 30 to 0, ordered the bill, as amended, to be reported to the House.

Background

Agent Orange

During the 9-year period from 1961 through 1969, the herbicide Agent Orange was used in South Vietnam primarily for the purpose of denying the enemy the cover of dense jungle foliage. Two phenoxy herbicides, 2,4-D and 2,4,5-T were used to formulate Agent Orange. Each of these components has been used extensively in agriculture since the mid-1940's. During this 9-year period, approximately 78 million pounds of 2,4,5-T were used domestically in the United States; while between 1961 and 1971, approximately 52 million pounds of 2,4,5-T were disseminated in South Vietnam. The 2,4,5-T contained the contaminant dioxin, a compound formed during the production processes and highly toxic to certain animal species. The amount of dioxin disseminated in the United States during the 9-year period between 1961 and 1969 was probably at least four times the amount disseminated in South Vietnam, according to an Air Force witness before the Committee.

The Committee recognizes the use of Agent Orange in Vietnam has caused much apprehension and concern among some Vietnam veterans and their families, giving

rise to controversy. Much publicity has been given to the alleged ill-health effects among some Vietnam veterans which they attribute to exposure to the dioxin in Agent Orange.

Since 1978 the Committee on Veterans' Affairs has held the following hearings on this issue:

October 11, 1978, Subcommittee on Medical Facilities and Benefits.

February 25, 1980, Subcommittee on Medical Facilities and Benefits.

July 22, 1980, Subcommittee on Medical Facilities and Benefits.

September 16, 1980, Subcommittee on Medical Facilities and Benefits.

May 6, 1981, Subcommittee on Oversight and Investigations.

September 15, 1982, Subcommittee on Oversight and Investigations.

April 26, 27 and July 12, 1983, Subcommittee on Compensation, Pension and Insurance.

May 3, 1983, Subcommittee on Oversight and Investigations.

Dozens of witnesses have testified with widely divergent views on the issue. The question of toxicity of dioxin is not in doubt—dioxin is one of the most highly toxic substances known to the scientific community although its toxicity for humans is unknown. What is less clear is how much exposure to the dioxin was experienced by Vietnam veterans, how much exposure can be expected to produce long-term health effects, and at what rate, or frequency, if any, are

these effects being experienced by veterans who served in Southeast Asia.

While a number of professionals in the scientific community have stated that some Vietnam veterans are suffering a high rate of cancers, skin and liver conditions, as well as a multiplicity of other conditions, there are no data or studies which substantiate this. There is no concensus of opinion in the scientific community that exposure to dioxin causes any identifiable disability other than chloracne.

Because of the concern and apprehension in the veteran community, the Congress mandated in Public Law 96-151 an epidemiological study on the effects of exposure to Agent Orange. At the suggestion of the Chairman and Ranking Minority Member of the Committee and other Members of the Congress, responsibility for conducting the study was transferred from the Veterans' Administration to the CDC in 1982. The study is expected to cost between $70 million and $100 million when it is completed. The sum of $2.3 million was allocated to the CDC by the Veterans' Administration in fiscal year 1983, and $53,974,000 is contained in Public Law 96-181 for the conduct of the study. Additional amounts will probably be necessary in future appropriations acts. Spokesmen for the CDC have projected the completion date of the study to be between 1987 and 1989.

There are numerous scientific human studies currently underway related to Agent Orange, dioxins and the Vietnam experience as a whole. The costs for the more than 67 projects involving the Veterans' Administration, the Environmental Protection Agency, and the Departments of Health and Human Services, Defense

and Agriculture are quoted as $150 million from fiscal years 1980 to 1985 and beyond. One of the more significant efforts now underway is an epidemiological study (known as the *Ranch Hand* Study) of Air Force personnel assigned to do the actual spraying of the herbicides. Approximately 1,300 servicemen were assigned to this unit from 1962 to 1971 and were the individuals who loaded the chemical on aircraft and flew the spraying missions. This group probably received more exposure, and on a repeated basis, than any other unit in Vietnam, although it is the position of many that ground troops may have experienced a higher level of exposure than those personnel involved in the air-spraying operations.

The first phase of the *Ranch Hand* Study on mortality was released in August 1983. Because of the small number of deaths the data contained no significant findings. No unusual grouping of causes of death was shown. The next phase of the study on morbidity is expected to be released in February or March 1984 and is expected to reflect the current health status of this group.

Veterans who believe they have been exposed to Agent Orange have complained of a variety of illnesses for which they seek medical treatment and disability compensation. These illnesses include, among others, skin conditions, cancers, nervousness, numbness in extremities, vision and/or hearing impairments, birth defects in their offspring and reduced libido. Veterans have also complained about the paucity of scientific information available on the health effects of Agent Orange and the perceived delays in the VA's response.

[page 6]

The VA maintains that it has responded to veterans' concerns from the outset by initiating health programs to identify veterans who may have been exposed and by implementing research projects on health effects and prompt implementation of Public Law 97-72 that authorizes the VA to treat Vietnam veterans for conditions that *may* be attributable to Agent Orange. Since 1978 the VA has provided physical examinations for Vietnam veterans who thought they were exposed to Agent Orange.

Current law requires the Veterans' Administration to provide in-patient and out-patient care and treatment to veterans who may have been exposed to Agent Orange while serving in Vietnam for any disability that may have resulted from such exposure, notwithstanding that there is insufficient medical evidence to conclude that such disability may be associated with exposure to Agent Orange.

The VA maintains a registry of all veterans who come to VA hospitals and health care facilities for Agent Orange examinations. The registry also contains information collected during the examination. As of October 1, 1983, 125,649 veterans had received the initial examination and about 75 percent of the key information had been entered into a computer.

As of October 1, 1983, veterans had filed 18,518 disability claims with the VA for disorders they attribute to Agent Orange exposure. Only half of these claimants had any disability at all. The other half either claimed no disability or had none diagnosed on physical examination. Of the 9,170 who had a diagnosed disability, 7,709 were denied because the evidence failed to show the condition had its inception in service.

The VA acknowledges that the skin disorder, chloracne, is causally related to Agent Orange exposure. Ninety-five percent of the remainder of 1,461 (16 percent) claims which were granted service connection were for skin conditions and the remaining 5 percent were for cancer, psychiatric, and neurological conditions, among others.

The VA denied 7,709 claims after there was a confirmed diagnosis of the condition for which the veteran had filed a claim. The denied claims fall into the following categories: 4,959 for various skin conditions other than chloracne; 2,484 for nervousness and headache or fatigue; 926 for paralysis or numbness; 841 for gastrointestinal or genito-urinary conditions; 567 for malignancies which include leukemia, lymphoma, melanoma, and Hodgkin's disease; 363 for impaired sexual activity; 472 for eye, ear, nose and throat pathology, 299 for lung conditions; 263 for cardiovascular conditions, and 152 claims denied for miscellaneous conditions.

Under current VA policy the resolution of disability claims for conditions that are now defined as non-service-connected (and therefore denied) will depend on the results of scientific studies which are now either pending or underway. Since it is expected that these studies will take years to complete, a spokesman for the VA has testified before the committee that "it may well be that the Congress cannot wait for scientific answers in the short term, in which case it may well be that the sociopolitical aspect of this problem will have to be addressed."

[page 7]

Members of the Committee have demonstrated their strong desire to respond to the apprehension and concern among some Vietnam veterans and their families about the possible long-term health effects that may have been caused by their exposure to the herbicide Agent Orange while serving in South Vietnam. Extensive hearings have been held, and it is generally agreed that there is insufficient credible scientific evidence that this group of veterans has demonstrated they are experiencing any higher incidence or frequency of medical problems related to their possible exposure to dioxin while in service as to warrant a statutory presumption that such medical problems are related to military service. Notwithstanding this fact, the Committee is proposing the temporary payment of benefits for certain disabilities until the Agent Orange Epidemiological Study has been completed and the results of such study are submitted to the Congress.

Atomic Veterans

Beginning in 1945 and continuing until 1963, the U.S. Government exploded approximately 235 nuclear devices in the atmosphere over the American Southwest and Pacific Ocean. The Department of Defense estimates that approximately 220,000 military personnel participated in those tests. Additional personnel may have been exposed while in the occupation forces in Japan after the atomic bombings of Hiroshima and Nagasaki in 1945. Many of these troops were exposed to low-level ionizing radiation which may or may not have been accurately documented with proper exposure devices or methodologies. To compound the problem, there is limited scientific understanding of the relationship between exposure to low doses of ionizing radiation and subsequent health problems.

Public concern about the health effects of low-level ionizing radiation has been heightened in recent years by the results of several studies. Since 1982, when cancer was first attributed to overexposure to X-rays, the U.S. Government has spent close to $2 billion (approximately $80 million per year in recent years) for research on the health effects of exposure to low-level ionizing radiation. At least 80,000 scientific papers on the subject have been published worldwide. While much has been learned about the carcinogenic effects of high doses of radiation exposure, scientists still are uncertain how low-level ionizing radiation exposure causes cancer, and how to predict the effects of exposure to low doses of ionizing radiation.

The Subcommittee on Oversight and Investigations held a hearing on May 24, 1983, to review Federal studies on health effects of low-level radiation exposure and implementation of Public Law 97-72. Included among the witnesses were spokespersons from the VA, the Center for Environmental Health (which is part of the CDC of the Department of Health and Human Services), the Defense Nuclear Agency, the National Academy of Sciences, Members of Congress, and representatives of a number of veterans' organizations.

The CDC conducted a study of the participants in the atmospheric nuclear test *Smoky*. There were 3,217 persons confirmed as present during the detonation of *Smoky* on August 31, 1957. The

[page 8]

CDC could not locate or determine the vital status of only 145 participants. Of the remaining 3,072 (95.5 percent of the total), CDC reviewed the death certificates of the 146 who are deceased and contacted the remaining 2,926 participants or their next of kin. Only 20 of those contacted refused to be included in the study.

According to United States mortality statistics, 365 deaths from all causes would have been expected in this population to date. In fact, there have been 320 deaths in *Smoky* participants.

CDC also calculated the expected number of cancer deaths for this population to be 64.3. In fact, they found 64. Of deaths from leukemia, 9 were found compared to 3.1 expected. This difference is statistically significant.

One other disease, polycythemia vera, was also found to have occurred at a higher than expected frequency in the nuclear test participants. CDC expected no more than 1 case but found 4. This disease, which is characterized by an inappropriate increase in the number and production of red blood cells, has not been previously shown to be caused by ionizing radiation.

In summary, the study of *Smoky* participants by the CDC found an increased frequency of the occurrence of leukemia and polycythemia vera. The study did not find evidence of increased frequency of cancer or death from cancer, but did observe less than the number of total deaths expected. Seymour Jablon of the National Academy of Sciences testified concerning his studies into the mortality among 52,000 veterans who had participated in five atmospheric tests, including the test series of which *Smoky* was a part (code-name PLUMBBOB). In contrast to the CDC findings concerning only *Smoky* participants, which Jablon's work verified, preliminary results show no excess mortality from leukemia, nor from other forms of cancer or other illnesses, among this much larger study cohort. He also testified that, given the timing of the introduction of the Hiroshima/Nagasaki occupation forces, none could have received radiation doses exceeding one-tenth rad.

There is an extensive body of information, mostly from follow-up studies of the health histories of the Japanese who were exposed at Hiroshima and Nagasaki, about the health effects of radiation exposure caused by nuclear detonation. However, there is very little information specifically related to veterans who were exposed during the weapons test program.

Public law 98-160, signed by the President on November 21, 1983, requires the Administrator of Veterans' Affairs to consider the feasibility of conducting an epidemiological study of the effects of low-level ionizing radiation on veterans who participated in the testing of nuclear devices or who were in the occupation forces at Hiroshima and Nagasaki immediately after World War II. If such a study is conducted it would be by an outside entity—not the Veterans' Administration.

It is expected that this study, if conducted, will be completed and submitted to the Congress well before the results of the Agent Orange epidemiological study are available. In the event the radiation study is received by the Congress prior to receipt of the Agent Orange epidemiological study, and should it contain clear evidence as to the health effects of radiation exposure suffered by

[page 9]

veterans, the Committee will at that time exercise its right to consider and recommend such legislation as it deems appropriate.

Veterans exposed to ionizing radiation while participating in nuclear tests, or the occupation of Hiroshima or Nagasaki, have a slightly stronger basis for consideration. Studies have shown a slightly higher

incidence of leukemia and polycythemia vera among participants of the *Smoky* test. Similar data reflecting increased health problems among veterans who served in Vietnam and who may have been exposed to Agent Orange are lacking. Although current evidence indicates that some veterans exposed to ionizing radiation are experiencing serious medical problems, available data falls far short of meeting the test that the exercise of sound medical judgment reflects that these disabilities are related to military service.

According to information furnished by the Defense Nuclear Agency, the duration of the military occupation of Hiroshima and Nagasaki was relatively short. The first U.S. units to occupy Hiroshima arrived October 6, 1945. U.S. Forces in Hiroshima were relieved by an Australian unit on March 6, 1946, and U.S. occupation in the vicinity came to an end at that time. The first advance party of the U.S. occupation force (about 12 personnel) arrived in Nagasaki on September 16, 1945. The last units departed Nagasaki in June 1946. The occupation of these two sites was completely within the World War II period as defined in title 38, United States Code.

Some Members of the Committee feel it would be better to wait for the results of the Agent Orange Epidemiological Study being conducted by the CDC before granting benefits for disabilities contained in the bill. Some feel that Congress should abide by its longstanding tradition that benefits should be paid only where substantive evidence is *clearly* available to establish that the disabling conditions existed while on active duty or are clearly related to such period of service. It was apparent, however, that this option did not reflect the view of all Members of the Committee and the reported bill represents a compromise on the highly emotional issues.

Summary of the Reported Bill

The reported bill, H.R. 1961, would provide that effective October 1, 1983, a temporary disability (or death) allowance would be payable to veterans who served in Southeast Asia during the Vietnam era and who later suffer from one of three conditions: soft-tissue sarcoma, porphyria cutanea tarda (a liver condition known as PCT), or chloracne (a skin condition). The soft-tissue sarcoma must be shown to exist within 20 years from date of departure from Southeast Asia and the other two disabilities, porphyria cutanea tarda (PCT) and chloracne must be manifested within 1 year from such departure. Monetary benefits would be paid at the rates prescribed in chapter 11 and chapter 13 of title 38, United States Code. Derivative benefits which flow from chapters 11 and 13 would also be available to persons eligible under the new chapter 14. Benefits would terminate under the sunset clause 1 year after the epidemiological study authorized by Public Law 96-151 is submitted to the Congress.

[page 10]

The reported bill would also provide that effective October 1, 1983, a temporary disability (or death) allowance would be payable to veterans who, while in service participated in the testing of a nuclear device or who served in the occupation forces at Hiroshima or Nagasaki after the bombing in 1945 and who, within 20 years after such participation, suffers from cancer of the thyroid polycythemia vera (a bone marrow disease) or leukemia. These benefits would be available under the same eligibility criteria and procedures as provided for veterans exposed to Agent Orange. Veterans eligible for benefits under the reported bill must have been

physically present at or near the test site at the time of detonation or shortly thereafter and not simply involved in the planning of the test.

The Committee intends that receipt of this new benefit be treated as if it were receipt of disability compensation or DIC for purposes of all Federal laws other than chapters 11 and 13 of title 38.

Section-By-Section Analysis

Section 1 provides that this act may be cited as the Agent Orange and Atomic Veterans Relief Act.

Section 2 declares the act's purposes—to provide benefits to veterans who served in Southeast Asia during the Vietnam era, and their survivors, if the veteran suffers or dies from a disease that may be attributable to Agent Orange exposure, and to veterans who participated in atomic tests or the occupation of Hiroshima or Nagasaki and their survivors, if the veteran suffers or dies from a disease that may be attributable to ionizing radiation, notwithstanding the lack of medical evidence sufficient to conclude that the disease is service connected.

Section 3 provides the statutory language for the new chapter 14.

Subsection (a) of section 3 would amend title 38, United States Code, by adding a new chapter 14 titled "Disability and Death Allowances for Certain Veterans and Survivors," consisting of new sections 451 through 455.

New section 451, relating to Agent Orange veterans and survivors, would consist of subsections (a) through (c).

Subsection (a) of new section 451 would require the VA to pay, at rates established under new section 452, a "disability allowance" to any veteran who served on active duty in Southeast Asia during the Vietnam era and after such service suffers from a disease described in subsection (b) of this new section, and a "death allowance" to any such veteran's survivors, if the veteran died from the disease.

Subsection (b) of new section 451 would establish, as diseases referred to in subsection (a), the following three: soft-tissue sarcoma appearing within 20 years of the veteran's departure from Southeast Asia; porphyria cutanea tarda appearing within 1 year of the veteran's departure from Southeast Asia, and chloracne appearing within 1 year of the veteran's departure from Southeast Asia.

Subsection (c) of new section 451 would bar the payment of benefits under this section if there is affirmative evidence that the veteran's disease was not incurred during his or her Southeast Asian

[page 11]

service or is a result of an intercurrent injury or another disease sustained post-service.

New section 452, relating to atomic veterans and survivors, would consist of subsections (a) through (c).

Subsection (a) of new section 452 would require the VA to pay, at rates established under new section 453, a disability allowance to any veteran who participated during the veteran's military service by being present at the detonation of an atomic bomb or device, or the occupation of Hiroshima or Nagasaki by the United States forces during World War II, and who, within 20

years after such participation, suffers from a disease described in subsection (b) of this new section, and a death allowance to any such veteran's survivors, if the veteran died from the disease.

Subsection (b) of new section 452 would establish, as diseases referred to in subsection (a), the following three: leukemia, polycythemia vera, and carcinoma of the thyroid.

Subsection (c) of new section 452 would bar the payment of benefits under this section if there is affirmative evidence that the veteran's disease was not incurred as a result of his or her participation in the testing of an atomic bomb or device, or military occupation of Hiroshima or Nagasaki, or is the result of an intercurrent injury or another disease sustained postservice.

New section 453, relating to rates payable as section 451 or 452 disability and death allowances, would key veterans' rates to compensation rates payable to veterans under chapter 11 of title 38, United States Code, according to the degree of disability, and survivors' rates and eligibility criteria to dependency and indemnity compensation rates and criteria under chapter 13 of title 38.

New section 454, relating to other benefits, would provide that a disease that established a veteran's or survivor's eligibility for section 451 benefits shall be considered as if it were service connected for purposes of all Federal laws (except chapters 11 and 13 of title 38), shall be treated as if the benefit were compensation or dependency and indemnity compensation, as appropriate, for purposes of Federal law.

New section 455, relating to termination, would provide for the termination of new chapter 14 authority to grant benefits 1 year after the VA's submission to Congress of the first report required by section 307(b)(2) of Public Law 96-151, the statute mandating a comprehensive epidemiological study of the effects of Agent Orange exposure on veterans' health.

Subsection (b) of section 3 would amend the chapter tables at the beginning of title 38 and the beginning of part II of such title to reflect the insertion of the new chapter 14.

Section 4 would provide for an effective date of October 1, 1983, and rule out payment of section 451 benefits for any period prior to that date.

Oversight Findings

No oversight findings have been submitted to the Committee by the Committee on Government Operations.

[page 12]

Budget Statement

As required by the Rules of the House, the following letter was received from the Congressional Budget Office concerning the cost of H.R. 1961, as amended.

U.S. Congress,
Congressional Budget Office,
Washington, D.C., November 8, 1983.

Hon. G. V. Montgomery,
Chairman, Committee on Veterans' Affairs, U.S. House of Representatives, Washington, D.C.

Dear Mr. Chairman: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate of H.R. 1961, the Agent Orange and Atomic Veterans Relief Act, as ordered reported by the House Committee on Veterans' Affairs, November 3, 1983.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

Rudolph G. Penner, *Director.*

Congressional Budget Office Cost Estimate

1. Bill number: H.R. 1961.

2. Bill title: Agent Orange and Atomic Veterans Relief Act.

3. Bill status: As ordered reported by the House Committee on Veterans' Affairs, November 3, 1983.

4. Bill purpose: This bill would provide a new category of benefits identical in dollar amounts to those provided under veterans' dis-

* * *

5 § 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.

5 § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.

5 § 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise

expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined all applications for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Pub.L. 9-554, Sept. 6, 1966, 80 Stat. 392.

5 § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

38 CFR Ch. 1

Public Participation

§ 1.12 Public participation in regulatory development.

It is the policy of the Veterans' Administration to afford the public general notice, published in the Federal Register, of proposed regulatory development, and an opportunity to participate in the regulatory development in accordance with the provisions of the Administrative Procedure Act (APA). All written comments received will be available for public inspection. Exceptions to the policy of permitting public participation in the regulatory development may be authorized by the Administrator or one of his Deputies if adequately justified and concurred in by the General Counsel. Such exceptions, unless public comment is required by statute, may be recommended when: (a) The proposed regulations consist of interpretative rules, general statements of policy, or rules of Veterans' Administration organization procedure or practice, or (b) when the Veterans' Administration for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impacticable, unnecessary, or contrary to the public interest.

§ 1.17 Evaluation of studies relating to health effects of dioxin and radiation exposure.

(a) From time to time, the Administrator shall publish evaluations of scientific or medical studies relating to the adverse health effects of exposure to 2,3,7,8 tetrachlorodibenzo-p-dioxin or ionizing radiation in the "Notices" section of the Federal Register.

(b) Factors to be considered in evaluating scientific studies include:

(1) Whether the study's findings are statistically significant and replicable.

(2) Whether the study and its findings have withstood peer review.

(3) Whether the study methodology has been sufficiently described to permit replication of the study.

(4) Whether the study's findings are applicable to the veteran population of interest.

(5) The views of the appropriate panel of the Scientific Council of the Veterans' Advisory Committee on Environmental Hazards, (Pub. L. 98-542).

§ 3.311b Claims based on exposure to ionizing radiation.

(a) *Determinations of exposure and dose*—(1) *Dose assessment.* In all claims in which it is established that a radiogenic disease, listed in paragraph (b)(2) of this section, first became manifest after service and was not manifest to a compensable degree within any applicable presumptive period as specified in § 3.307, and it is contended the disease is a result of exposure to ionizing radiation in service, an assessment will be made as to the size and nature of the radiation dose or doses. When dose estimates provided pursuant to paragraph (a)(2) of this section are reported as a range of doses to which a veteran may have been exposed, exposure at the highest level of the dose range reported will be presumed.

(2) *Request for dose information.* Where necessary pursuant to paragraph (a)(1) of this section, dose information will be requested as follows:

(i) *Atmospheric nuclear weapons test participation claims.* In claims based upon participation in atmospheric nuclear testing, dose data will in all cases be requested from the appropriate office of the Department of Defense.

(ii) *Hiroshima and Nagasaki occupation claims.* In all claims based on participation in the American occupation of Hiroshima or Nagasaki, Japan, prior to July 1, 1946, dose data will be requested from the Department of Defense.

(iii) *Other exposure claims.* In all other claims involving radiation exposure, a request will be made for any available records concerning the veteran's exposure to radiation. These records normally include but may not be limited to the veteran's Record of Occupational Exposure to Ionizing Radiation (DD Form 1141), if maintained, service medical records, and other records which may contain information pertaining to the veteran's radiation dose in service. All such records will be forwarded to the Chief Medical Director, who will be responsible for preparation of a dose estimate, to the extent feasible, based on available methodologies.

(3) *Referral to independent expert.* When necessary to reconcile a material difference between an estimate of dose, from a credible source, submitted by or on behalf of a claimant, and dose data derived from official military records, the estimates and supporting documentation shall be referred to an independent expert, selected by the Director of the National Institutes of Health, who shall prepare a separate radiation dose estimate for consideration in adjudication of the claim. For purposes of this paragraph:

(i) The difference between the claimant's estimate and dose data derived from official military records shall ordinarily be considered material if one estimate is at least double the other estimate.

(ii) A dose estimate shall be considered from a "credible source" if prepared by a person or persons certified by an appropriate professional body in the field of health physics, nuclear medicine or radiology and if based on analysis of the facts and circumstances of the particular claim.

(4) *Exposure.* In cases described in paragraph (a)(2)(i) and (ii) of this section:

(i) If military records do not establish presence at or absence from a site at which exposure to radiation is claimed to have occurred, the veteran's presence at the site will be conceded.

(ii) Neither the veteran nor the veteran's survivors may be required to produce evidence substantiating exposure if the information in the veteran's service records or other records maintained by the Department of Defense is consistent with the claim that the veteran was present where and when the claimed exposure occurred.

(b) *Initial review of claims.* (1) When it is determined:

(i) A veteran was exposed to ionizing radiation as a result of participation in the atmospheric testing of nuclear weapons, the occupation of Hiroshima or Nagasaki, Japan, from September 1945 until July 1946, or other activities as claimed;

(ii) The veteran subsequently developed a radiogenic disease specified in paragraph (b)(2) of this section; and

(iii) Such disease first became manifest within the period specified in paragraph (b)(4) of this section; before its adjudication the claim will be referred to the Chief Benefits Director for further consideration in accordance with paragraph (c) of this section. If any of the foregoing 3 requirements has not been met, it shall not be determined that a disease has resulted from exposure to ionizing radiation under such circumstances. (But see paragraph (h) of this section.)

(2) For purposes of paragraphs (a)(1) and (b)(1) of this section, "radiogenic disease" shall include only the following:

(i) All forms of leukemia except chronic lymphatic leukemia:
(ii) Thyroid cancer;
(iii) Female breast cancer;
(iv) Lung cancer;
(v) Bone cancer;
(vi) Liver cancer;
(vii) Skin cancer;
(viii) Esophageal cancer;
(ix) Stomach cancer;
(x) Colon cancer;
(xi) Pancreatic cancer;
(xii) Kidney cancer;
(xiii) Urinary bladder cancer;
(xiv) Salivary gland cancer; and
(xv) Multiple myeloma.

(3) For purposes of paragraphs (a)(1) and (b)(1) of this section, "radiogenic disease" shall not include polycythemia vera.

(4) For purposes of paragraph (b)(1) of this section:

(i) Leukemias and bone cancer must become manifest within 30 years after exposure;

(ii) Other forms of cancer specified in paragraph (b)(2) of this section must become manifest 5 years or more after exposure.

(c) *Review by Chief Benefits Director.* (1) When a claim is forwarded for review pursuant to paragraph (b)(1) of this section, the Chief Benefits Director shall consider the claim with reference to the factors specified in paragraph (e) of this section and may request an advisory medical opinion from the Chief Medical Director.

(i) If after such consideration the Chief Benefits Director is convinced sound scientific and medical evidence supports the conclusion it is at least as likely as not the veteran's disease resulted from exposure to radiation in service, the Chief Benefits Director shall so inform the regional office of jurisdiction in writing. The Chief Benefits Director shall set forth the rationale for this conclusion, including an evaluation of the claim under the applicable factors specified in paragraph (e) of this section.

(ii) If the Chief Benefits Director determines there is no reasonable possibility that the veteran's disease resulted from radiation exposure in service, the Chief Benefits Director shall so inform the regional office of jurisdiction in writing, setting forth the rationale for this conclusion.

(2) If the Chief Benefits Director, after considering any opinion of the Chief Medical Director, is unable to conclude whether it is at least as likely as not, or that

there is no reasonable possibility, the veteran's disease resulted from radiation exposure in service, the Chief Benefits Director shall refer the matter to an outside consultant in accordance with paragraph (d) of this section.

(3) For purposes of paragraph (c)(1) of this section, "sound scientific evidence" means observations, findings, or conclusions which are statistically and epidemiologically valid, are statistically significant, are capable of replication, and withstand peer review, and "sound medical evidence" means observations, findings, or conclusions which are consistent with current medical knowledge and are so reasonable and logical as to serve as the basis of management of a medical condition.

(d) *Referral to outside consultants.* (1) Referrals pursuant to paragraph (c) of this section shall be to consultants selected by the Chief Medical Director from outside the VA, upon the recommendation of the Director of the National Cancer Institute. The consultant will be asked to evaluate the claim and provide an opinion as to the likelihood the disease is a result of exposure as claimed.

(2) The request for opinion shall be in writing and shall include a description of:

(i) The disease, including the specific cell type and stage, if known, and when the disease first became manifest;

(ii) The circumstances, including date, of the veteran's exposure;

(iii) The veteran's age, gender, and pertinent family history;

(iv) The veteran's history of exposure to known carcinogens, occupationally or otherwise;

(v) Evidence of any other effects radiation exposure may have had on the veteran; and

(vi) Any other information relevant to determination of causation of the veteran's disease.

The Chief Benefits Director shall forward, with the request, copies of pertinent medical records and, where available, dose assessments from official sources, from credible sources as defined in paragraph (a)(3)(ii) of this section, and from an independent expert pursuant to paragraph (a)(3) of this section.

(3) The consultant shall evaluate the claim under the factors specified in paragraph (e) of this section and respond in writing, stating whether it is either likely, unlikely, or approximately as likely as not the veteran's disease resulted from exposure to ionizing radiation in service. The response shall set forth the rationale for the consultant's conclusion, including the consultant's evaluation under the applicable factors specified in paragraph (e) of this section. The Chief Benefits Director shall review the consultant's response and transmit it with any comments to the regional office of jurisdiction for use in adjudication of the claim.

(e) *Factors for consideration.* Factors to be considered in determining whether a veteran's disease resulted from exposure to ionizing radiation in service include:

(1) The probable dose, in terms of dose type, rate and duration as a factor in inducing the disease, taking into account any known limitations in the dosimetry devices employed in its measurement or the methodologies employed in its estimation;

(2) The relative sensitivity of the involved tissue to induction, by ionizing radiation, of the specific pathology;

(3) The veteran's gender and pertinent family history;

(4) The veteran's age at time of exposure;

(5) The time-lapse between exposure and onset of the disease; and

(6) The extent to which exposure to radiation, or other carcinogens, outside of service may have contributed to development of the disease.

(f) *Adjudication of claim.* The determination of service connection will be made under the generally applicable provisions of this part, giving due consideration to all evidence of record, including any opinion provided by the Chief Medical Director or an outside consultant, and to the evaluations published pursuant to § 1.17 of this title. With regard to any issue material to consideration of a claim, the provisions of § 3.102 of this title apply.

(g) *Willful misconduct and supervening cause.* In no case will service connection be established if the disease is due to the veteran's own willful misconduct, or if there is affirmative evidence to establish that a supervening, nonservice-related condition or event is more likely the cause of the disease.

(h) *Service connection otherwise established.* Nothing in this section will be construed to prevent the establishment of service connection for any injury or disease otherwise shown by sound scientific or medical evidence to have been incurred or aggravated during active service.

(Pub. L. 98-542)

[50 FR 34458, Aug. 26, 1985]

§ 211. Decisions by Administrator; opinions of Attorney General

Amendment of Subsec. (a)

Pub.L. 100-687, Div. A, Title I, § 101(a), Title IV, § 401(a), Nov. 18, 1988, 102 Stat. 4105, 4122, amended subsec. (a), effective on Sept. 1, 1989, to read as follows:

(a)(1) The Administrator shall decide all questions of law and fact necessary to a decision by the Administrator under a law that affects the provision of benefits by the Administrator to veterans or the dependents or survivors of veterans. Subject to paragraph (2) of this subsection, the decision of the Administrator as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

(2) The second sentence of paragraph (1) of this subsection does not apply to—

(A) matters subject to section 223 of this title;

(B) matters covered by sections 775 and 784 of this title;

(C) matters arising under chapter 37 of this title; and

(D) matters covered by chapter 72 of this title.

§ 223.[1] Rulemaking; procedures and judicial review

(a) In applying section 552(a)(1) of title 5 to the Veterans' Administration, the Administrator shall ensure that subparagraphs (C), (D), and (E) of that section are complied with, particularly with respect to opinions and interpretations of the General Counsel.

(b) The provisions of section 553 of title 5 shall apply, without regard to subsection (a)(2) of that section, to matters relating to loans, grants, or benefits under a law administered by the Administrator.

(c) An action of the Administrator to which section 552(a)(1) or 553 of title 5 (or both) refers (other than an action relating to the adoption or revision of the schedule of ratings for disabilities adopted under section 355 of this title) is subject to judicial review. Such review shall be in accordance with chapter 7 of title 5 and may be sought only in the United States Court of Appeals for the Federal Circuit. However, if such review is sought in connection with an appeal brought under the provisions of chapter 72 of this title, the provisions of that chapter shall apply rather than the provisions of chapter 7 of title 5.

(Added Pub. L. 100-687, Div. A, Title I, §401(a)(1), Nov. 18, 1988, 102 Stat. 4122.)

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[1] Another section 223 is set out, ante.

38 § 223 Veterans' Benefits

Effective Date

Pub.L. 100-687, Div. A, Title I, § 401(a), Nov. 18, 1988, 102 Stat. 4122, provided that this section shall take effect on Sept. 1, 1989.

"SHORT TITLE

"Section 1. This Act [amending this section, enacting provisions set out as notes under this section, and amending provisions set out as notes under section 219 of this title] may be cited as the 'Veterans' Dioxin and Radiation Exposure Compensation Standards Act'.

"FINDINGS

"Sec. 1. The Congress makes the following findings:

"(1) Veterans who served in the Republic of Vietnam during the Vietnam era and veterans who participated in atomospheric nuclear tests or the American occupation of Hiroshima or Nagasaki, Japan, are deeply concerned about possible long-term health effects of exposure to herbicides containing dioxin or to ionizing radiation.

"(2) There is scientific and medical uncertainty regarding such long-term adverse health effects.

"(3) In section 102 of Public Law 97-72 [Probably means section 102 of Pub.L. 97-72, which amended sections 610 and 612 of this title], the Congress responded to that uncertainty by authorizing priority medical care at Veterans' Administration facilities for any disability of a veteran who may have been so exposed (even though there is insufficient medical evidence linking such disability with such exposure) unless the disability is found to have resulted from a cause other than the exposure.

"(4) The Congress has further responded to that medical and scientific uncertainty by requiring in section 307 of Public Law 96-151 and section 601 of Public Law

96-160, [set out as notes under section 219 of this title] the conduct of thorough epidermiological studies of the health effects experienced by veterans in connection with exposure both to herbicides containing dioxin and (if not determined to be scientifically infeasible) to radiation and by requiring in Public Law 97-414, [see Tables volume] the development of radioepidermiological tables setting forth the probabilities of causation between various cancers and exposure to radiation.

"(5) There is some evidence that chloracne, porphyria cutanea tards, and soft tissue sarcoma are associated with exposure to certain levels of dioxin as found in some herbicides and that most types of leukemia, malignancies of the thyroid, female breast, lung, bone, liver, and skin, and polycythemia vera are associated with exposure to certain levels of ionizing radiation.

"(6) As of the date of the enactment of this Act [Oct.24,1984], there are sixty-six Federally sponsored research projects being conducted relating to herbicides containing dioxin, at a cost to the Federal Government in excess of $130,000,000 and, as of 1981, federally sponsored research projects relating to ionizing radiation were costing the Federal Government more than $115,000,000.

"(7) The initial results of one project—an epidermiological study, conducted by the United States Air Force School of Aerospace Medicine, of the health status of the "Ranch Hand" veterans who carried out the loading and aerial spraying of herbicides containing dioxin in Vietnam and in the process came into direct skin contact with such herbicides in their most concentrated liquid form—were released on February 24, 1984, and contained the conclusion 'that there is

insufficient evidence to support a cause and effect relationship between herbicide exposure and adverse health in the Ranch Hand group at this time'.

"(8) The 'film badges' which were originally issued to members of the Armed Forces in connection with the atmospheric nuclear test program have previously constituted a primary source of dose information for veterans (and survivors of veterans) filing claims for Veterans' Administration disability compensation or dependency and indemnity compensation in connection with exposure to radiation.

"(9) These film badges often provide an incomplete picture of radiation exposure, since they were not capable of recording inhaled, ingested, or neutron doses (although the Defense Nuclear Agency currently has the capability to reconstruct individual estimates of such doses), were not issued to most of the participants in nuclear tests, often provided questionable readings because they were shielded during the detonation, and were worn for only limited periods during and after each nuclear detonation.

"(10) Standards governing the reporting of dose estimates in connection with radiation-related claims for Veterans' Administration disability compensation vary among the several branches of the Armed Forces, and no uniform minimum standards exist.

"(11) The Veterans' Administration has not promulgated permanent regulations setting forth specific guidelines, standards, and criteria for the adjudication of claims for Veterans' Administration disability compensation based on exposure to herbicides containing dioxin or to ionizing radiation.

"(12) Such claims (especially those involving health effects with long latency periods) present adjudicatory issues which are significantly different from issues generally presented in claims based upon the usual types of injuries incurred in military service.

"(13) It has always been the policy of the Veterans' Administration and is the policy of the United States, with respect to individual claims for service connection of diseases and disabilities, that when, after consideration of all evidence and material of record, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of a claim, the benefit of the doubt in resolving each such issue shall be given to the claimant.

"PURPOSE

"Sec. 3. The purpose of this Act [Pub.L.98-542, see section 1 of this note] is to ensure that Veterans' Administration disability compensation is provided to veterans who were exposed during service in the Armed Forces in the Republic of Vietnam to a herbicide containing dioxin or to ionizing radiation in connection with atmosperic nuclear tests or in connection with the American occupation in Hiroshima or Nagasaki, Japan, for all disabilities arising after that service that are connected, based on sound scientific and medical evidence, so such service (and that Veterans' Administration dependency and indemnity compensation is provided to survivors of those veterans for all deaths resulting from such disabilities)."

Requirement for and Content of Regulations; Advisory Committee on Evironmental Standards, Nuclear Radiation Matters Involving Other Agencies. Sections 5 to 7 of Pub.L 98-542, as amended Pub.L. 100-321, §2(c), May 20, 1988. 102 Stat. 486, provided that:

"REQUIREMENT FOR AND CONTENT OF REGULATIONS

"Sec. 5. (a) in carrying out the responsibilities of the Administrator of Veterans' Affairs under section 354(a)(2)of title 32, United States Code, [subsec. (a)(2) of this section] and in order to promote consistency in claims processing and decisions, the Administrator shall prescribe regulations to—

"(1) establish guidelines and (where appropriate) standards and criteria for the resolutions of claims for benefits under laws administered by the Veterans' Administration where the criteria for eligibility for a benefit include a requirement that a death or disability be service connected and the claim of service connection is based on a veteran's exposure during service—

"(A) in the Republic of Vietnam during the Vietnam era to a herbicide containing dioxin, or

"(B) is connected with such veteran's participation in atmospheric nuclear tests or with the American occupation of Hiroshima or Nagasaki, Japan, prior to July 1, 1946, to ionizing radiation from the detonation of a nuclear device, and

"(2) ensure that, with respect to those claims, the policy of the United States described in section 2(13) [section 2(13) of Pub.L. 98-542, set out as a note above] is carried out.

"(b)(1)(A) The guidelines required to be established in regulations prescribed under this section shall include guidelines governing the evaluation of the findings of scientific studies relating to the possible increased risk of adverse health effects of exposure to herbicides containing dioxin or of exposure to ionizing radiation. Those guidelines shall require that, in the evaluation of

those studies, the Administrator shall take into account whether the results are statistically significant, are capable of replication, and withstand peer review.

"(B) The evaluations described in subparagraph (A) shall be made by the Administrator of Veterans' Affairs after receiving the advice of the appropriate panel of the Scientific Council of the Veterans' Advisory Committee on Environmental Hazards (established under section 6 [this note]). Those evaluations shall be published in the notice section of the Federal Register.

"(C) The standards and criteria required to be established in regulations prescribed under this action shall include provisions governing the use in the adjudication of individual claims of the Administrator's evaluations made under subparagraph (B).

(2)(A)(i) In prescribing regulations under this section, the Administrator (after receiving the advice of the Advisory Committee and of the appropriate panel of the Scientific Council of the Veterans' Advisory Committee on Environmental Hazards regarding the diseases described in subparagraph (B)) shall make determinations, based on sound medical and scientific evidence, with respect to each disease described in subparagraph (B) as to whether service connection shall, subject to division (H) of this subparagraph, be granted in the adjudication of individual cases. In making determinations regarding such diseases, the Administrator shall give due regard to the need to maintain the policy of the United States with respect to the resolution of contested issues as set forth in section 2(13) [section 2(13) of Pub.L. 98-542 set out as a note above]. The Administrator shall set forth in such regulations such determinations, with any specification (relating to exposure or other relevant matter) of

limitations on the circumstances under which service connection shall be granted, and shall implement such determination in accordance with such regulations.

"(ii) If the Administrator makes a determination, pursuant to this subparagraph, that service connection shall be granted in the case of a disease described in subparagraph (B), the Administrator shall specify in such regulations that, in the adjudication of individual cases, service connection shall not be granted where there is sufficient affirmative evidence to the contrary or evidence to establish that an intercurrent injury or disease which is a recognized cause of the described disease has been suffered between the date of separation from service and the onset of such disease or that the disability is due to the veteran's own willful misconduct.

"(iii) With regard to each disease described in subparagraph (B), the Administrator shall include in the regulations prescribed under this section provisions specifying the factors to be considered in adjudicating issues relating to whether or not service connection should be granted in individual cases and the circumstances governing the granting of service connection for such disease.

"(B) The diseases referred to in subparagraph (A) are those specified in section 2(5) [section 2(5) of Pub.L. 98-542, set out as a note above] and any other disease with respect to which the Administrator finds (after receiving and considering the advice of the appropriate panel of the Scientific Council established under section 6(d)(2) [this note] that there is sound scientific or medical evidence indicating—

> "(i) a connection to exposure to a herbicide containing dioxin, in the case of a veteran who was exposed to that herbicide during such veteran's

service in the Republic of Vietnam during the Vietnam era or

"(ii) a connection to exposure to ionizing radiation, in the case of a veteran who was exposed to ionizing radiation in connection with such veteran's participation in an atmospheric nuclear test or with the American occupation of Hiroshima or Nagasaki, Japan, before July 1, 1946.

"(3) The regulations prescribed under the section shall include—

"(A) specification of the maximum period of time after exposure to such herbicide or ionizing radiation for the development of those diseases and

"(B) a requirement that a claimant filing a claim based upon a veteran's exposure to a herbicide containing dioxin or to ionizing radiation from the detonation of a nuclear device may not be required to produce evidence substantiating the veteran's exposure during active military, naval, or air service if the information in the veteran's service records and other records of the Department of Defense is not inconsistent with the claim that the veteran was present where and when the claimed exposure occurred.

"(c)(1) The Administrator of Veterans' Affairs shall develop the regulations required by this section (and any amendment to those regulations) through a public review and comment process in accordance with the provisions of section 553 of title 5, United States Code [Section 553 of Title 5, Government Organization and Employees]. That process may include consideration by the Administrator of the recommendations of the Veterans' Advisory Committee on Environmental Hazards and the Scientific Council thereof (established under section 6 [this note]) with respect to the proposed regulations, and

that process shall include consideration by the Administrator of the recommendations of the Committee and the Council with respect to the final regulations and proposed and final amendments to such regulations. The period for public review and comment shall be completed not later than ninety days after the proposed regulations of proposed amendments are published in the Federal Register.

"(2)(A) Not later than one hundred and eighty days after the date of the enactment of this Act [Oct. 24, 1984], the Administrator shall develop and publish in the Federal Register a proposed version of the regulations required to be prescribed by this section.

"(B) Not later than three hundred days after the date of the enactment of this Act [Oct. 24, 1984], the Administrator shall publish in the Federal Register the final regulations (together with explanations of the bases for the guidelines, standards, and criteria contained therein) required to be prescribed by this section.

"ADVISORY COMMITTEE ON ENVIRONMENTAL HAZARDS

"Sec. 6. (a) The advisory committee referred to in subsections (b) and (c) of section 5 [this note], to be known as the Veterans' Advisory Committee on Environmental Hazards (hereinafter in this section referred to as the 'Committee') shall consist of fifteen members appointed by the Administrator of Veterans' Affairs after requesting and considering recommendations from veteran organizations, including—

"(1) eleven individuals (of whom none may be members of the Armed Forces on active duty or employees of the Veterans' Administration or the Department of Defense and not more than three

may be employees of other Federal departments or agencies), appointed, after requesting and considering the recommendations of the heads of Federal entities with particular expertise in biomedical and environmental science, including—

"(A) three individuals who are recognized medical or scientific authorities in fields pertinent to understanding the health effects of exposure to dioxin:

"(B) three individuals who are recognized medical or scientific authorities in fields pertinent to understanding the health effects of exposure to ionizing radiation; and

"(C) five individuals who are recognized medical or scientific authorities in fields, such as epidermiology and other scientific disciplines, pertinent to determining and assessing the health effects of exposure to dioxin or ionizing radiation in exposed populations; and

"(2) four individuals from the general public, including at least one disabled veteran, having a demonstrated interest in and experience relating to veterans' concerns regarding exposure to dioxin or ionizing radiation.

"(b) The Committee shall include, as ex officio, nonvoting members, the Chief Medical Director and the Chief Benefits Director of the Veterans' Administration, or their designees.

"(c) The Committee shall submit to the Administrator any recommendations it considers appropriate for administrative or legislative action.

"(d)(1) The eleven members of the Committee described in subsection (a)(1) shall, in addition to serving as members of the Committee, constitute a Scientific Council of the Committee (hereinafter in this section referred to as the 'Council')

"(2) The Council shall be divided into (A) an eight-member panel with responsibility for evaluating scientific studies relating to possible adverse health effects of exposure to dioxin, and (B) an eight-member panel with responsibility for evaluating scientific studies relating to possible adverse health effects of exposure to ionizing radiation.

"(3) The Council shall make findings and evaluations regarding pertinent scientific studies and shall submit to the Committee, the Administrator, and the Committee on Veterans' Affairs of the Senate and House of Representatives directly periodic reports on such findings and evaluations.

"(e) The Administrator shall designate one of the members to chair the Committee and another member to chair the Council.

"(f) The Administrator shall determine the terms of service and pay and allowances of members of the Committee except that a term of service of any member may not exceed three years. The Administrator may reappoint any member for additional terms of service.

"(g) The Administrator shall provide administrative support services and fiscal support for the Committee.

"NUCLEAR RADIATION MATTERS INVOLVING OTHER AGENCIES

"Sec. 7. (a) In connection with the duties of the Director of the Defense Nuclear Agency, as Department of Defense Executive Agent for the Nuclear Test Personnel Review Program, relating to the preparation of radiation dose estimates with regard to claims for Veterans' Administration disability compensation and

dependency and indemnity compensation under chapters 11 and 13 respectively, of title 38, United States Code [this chapter and 13 of this title]—

"(I) the Secretary of Defense shall prescribe guidelines (and any amendment to those guidelines) through a public review and comment process in accordance with the provisions of Section 553 of title 5, United States Code [section 553 of Title 5, Government Organization and Employees]—

"(A) specifying the minimum standards governing the preparation of radiation dose estimates in connection with claims for such compensation,

"(B) making such standards uniformly applicable to the several branches of the Armed Forces, and

"(C) requiring that each such estimate furnished to the Veterans' Administration and to any veteran or survivor include information regarding all material aspects of the radiation environment to which the veteran was exposed and which form the basis of the claim, including inhaled, ingested, and neutron doses; and

"(2) the Secretary of Health and Human Services, through the Director of the National Institute of Health, shall—

"(A) conduct a review of the reliability and accuracy of scientific and technical devices and techniques (such as 'whole body counters') which may be useful in determining previous radiation exposure.

"(B) submit to the Administrator of Veterans' Affairs and the Committees on Veterans' Affairs of the House of Representatives and the Senate, not later than July 1, 1985, a report regarding the results of such review, including information

concerning the availability of such devices and techniques, the categories of exposed individuals as to whom use of such devices and techniques may be appropriate, and the reliability and accuracy of dose estimates which may be derived from such devices and techniques; and

"(C) enter into an interagency agreement with the Administrator of Veterans' Affairs for the purpose of assisting the Administrator in identifying agencies or other entities capable of furnishing services involving the use of such devices and techniques.

"(b) The Administrator of Veterans' Affairs, in resolving material differences between a radiation dose estimate, from a credible source, submitted by a veteran or survivor and a radiation dose estimate prepared and transmitted by the Director of the Defense Nuclear Agency, shall provide for the preparation of a radiation dose estimate by an independent expert, who shall be selected by the Director of the National Institute of Health and who shall be affiliated with the Defense Nuclear Agency, and the Administrator shall provide for the consideration of such independent estimate in connection with the adjudication of the claim for Veterans' Administration compensation."

Interim Benefits for Disability or Death in Certain Cases. Section 9 of Pub.L. 98-542 provided that:

"Sec.9. (a)(1) In the case of a veteran—

"(A) who served in the active military, naval, or air service in the Republic of Vietnam during the Vietnam era; and

"(B) who has a disease described in subsection (b) that became manifest within one year after the date of the veteran's most recent departure from the Republic of Vietnam during that service.

the Administrator shall (except as provided in subsection (c) pay a monthly disability benefit to the veteran in accordance with this section.

"(a) If a veteran described in paragraph (1) dies from the disease, the Administrator shall pay a monthly death benefit to the survivors of the veteran in accordance with this section.

"(b) The diseases referred to in subsection (a) are chloracne and porphyria cutanea tards.

"(c) Benefits may not be paid under this section with respect to a disease occurring in a veteran—

> "(1) where there is affirmative evidence that the disease was not incurred by the veteran during service in the Republic of Vietnam during the Vietnam era;
>
> "(2) where there is affirmative evidence to establish that an intercurrent injury or disease which is a recognized cause of the disease was suffered by the veteran between the date of the veteran's most recent departure from the Republic of Vietnam during active military, naval, or air service and the onset of the disease; or
>
> "(3) if the Administrator determines, based on evidence in the veteran's service records and other records of the Department of Defense, that the veteran was not exposed to dioxin during active military, naval, or air service in the Republic of Vietnam during the Vietnam era.

"(d)(1) A disability benefit payable to a veteran under this section for a disease described in subsection (b) shall be paid at the rate at which compensation would be payable under chapter 11 of title 38, United States Code [this chapter], to that veteran for the disability resulting from that disease if the disability were determined to be service-connected.

"(2) A death benefit payable under this section to the survivors of a veteran shall be paid to such survivors based upon the eligibility requirement (other than the requirements that death be the result of a service-connected or compensable disability) and at the rates that are applicable to dependency and indemnity compensation under chapter 13 of that title [chapter 13 of this title].

"(e) A benefit may not be paid under this section with respect to a disease or the death of a veteran for any month for which compensation is payable to that veteran for that disease under chapter 11 of title 38, United States Code [this chapter], or for which dependency and indemnity compensation is payable for that death under chapter 13 of such title [chapter 13 of this title].

"(f) A disease establishing eligibility for a disability or death benefit under this section shall be treated for purposes of all other laws of the United States (other than chapters 11 and 13 of title 38, United States Code) [this chapter and chapter 13 of this title] as if such disease were service connected. The receipt of a disability benefit under this section shall be treated for purposes of all other laws of the United States as if such benefit were compensation under chapter 11 of such title, and the receipt of a death benefit under this section shall be treated for purposes of all other laws of the United States as if such benefit were dependency and indemnity compensation under chapter 13 of title 38, United States Code.

"(g) For the purposes of this section:

"(1) The term 'Administrator' means the Administrator of Veterans' Affairs.

"(2) The term 'Vietnam era' means the period beginning on August 5, 1964 and ending on May 7, 1975.

"(3) The term 'veteran' has the meaning given that term in paragraph (2) of section 101 of title 38, United States Code [section 101(2) of this title] and includes a person who died in the active military, naval, or air service.

"(4) The terms 'service-connected' and 'active military, naval, or air service' have the meanings given those terms in paragraphs (16) and (24), respectively, of section 101 of title 38, United States Code [section 101(16) and (24) of this title].

"(h)(1) This section takes effect as of October 1, 1984. No benefit may be paid under this section for a period before that date.

"(2) No benefit may be paid under this section for a period after September 30, 1986.

Legislative History. For legislative history and purpose of Pub.L. 98-542, see 1984 U.S.Code Cong. and Adm.News. p. 4449.

Amendment V—Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, *(6) failure to state a claim upon which relief can be granted,* (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 56. Summary Judgment

(a) For claimant

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For defending party

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and proceedings thereon

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated

therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When affidavits are unavailable

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.)